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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 132.

ANTOINE G. STARR, AN INFANT, BY HIS GUARDIAN, A. PEARCE TOMKINS, PLAINTIFF IN ERROR,

vs.

SAMUEL W. CAMPBELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 15, 1906.

(20,420.)

(20,420.)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 7, 1907.



1 United States Circuit Court for the Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,

vs.

SAMUEL W. CAMPBELL, Defendant.

W. M. Tomkins, attorney for plaintiff.
William G. Wheeler, attorney for defendant.

2 UNITED STATES OF AMERICA,
Western District of Wisconsin:

At a stated term of the Circuit Court of the United States for the Western District of Wisconsin, begun and held at the city of Superior, in said district, on the third Tuesday, being the 19th day of June, 1906, present and presiding, the Honorable Arthur L. Sanborn, United States District Judge, the following proceedings, among others, were had, to-wit:

2½ Circuit Court of the United States, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,

vs.

SAMUEL W. CAMPBELL, Defendant.

Precipe.

The Clerk of said Court will please issue a Summons in the action above entitled, *complaint served.*

W. M. TOMKINS,
Plaintiff's Attorney.

[Endorsed:] Law Docket C, No. 148. United States Circuit Court, Western District of Wisconsin. Antoine G. Starr, an infant by A. Pearce Tomkins, his guardian, Plaintiff, *vs.* Samuel W. Campbell, Defendant. Precipe. Filed June 19, 1906. F. W. Oakley, Clerk. Filed ——, 18—. W. M. Tomkins, Plaintiff's Attorney.

3 UNITED STATES OF AMERICA,
Western District of Wisconsin, ss:

Circuit Court, —— Term, A. D. 1906.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

In ——.

I enter plaintiff's security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the Plaintiff of any costs ordered or adjudged to be paid by him hereby agree and stipulate that execution may issue against my property for all costs not exceeding two hundred dollars taxed against plaintiff.

Dated this 19th day of June A. D. 1906.

W. M. TOMKINS,
Residence, Ashland, Wis.

[Endorsed:] No. 148 Law C. Circuit Court United States, Western District Wisconsin. Antoine G. Starr, an infant by A. Pearce Tomkins, his guardian, Plaintiff, *vs.* Samuel W. Campbell, Defendant. Bond for Costs. Filed June 19, 1906. F. W. Oakley, Clerk.

On the same day a summons was issued out of said Clerk's office against said defendant, in the words and figures following, to-wit:

4 Circuit Court of the United States for the Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian,
vs.
SAMUEL W. CAMPBELL.

The President of the United States of America to said Defendant:

You are hereby summoned to appear within twenty days after service of this summons, exclusive of the day of service, and defend the above entitled action in the Court aforesaid; and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint, which has been filed in the office of the Clerk of this Court, at Madison, Wisconsin.

And you are also required to file your answer in said action in the office of the Clerk of this Court, at the City of Madison, within the time above specified.

The Marshal of said District is hereby commanded to serve this summons, and make due return thereto.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at the City of Madison, in the said Western District of Wisconsin, this 19 day of June in the year of our Lord one thousand nine hundred and six and of the Independence of the United States the one hundred and thirtieth.

F. W. OAKLEY, *Clerk.*

W. M. TOMKINS,
Plaintiff's Attorney.
P. O. Address, Ashland, Wis.

[Endorsed:] Law Docket 148 C. Antoine G. Starr, an infant, by A. P. Tomkins, his guardian, *vs.* S. W. Campbell. Summons and Complaint. Service of the within summons is admitted this 19th day of June, 1906. William G. Wheeler, Attorney for S. W. Campbell. Filed June 19, 1906. F. W. Oakley, Clerk.

On the same day the plaintiff duly filed his complaint in the words and figures following to-wit:

5 United States Circuit Court, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

The plaintiff complaining of the defendant alleges:

1. That the plaintiff is an infant, under the age of twenty-one years.

2. That on the 5th day of September, 1905, at Ashland, in the county of Ashland, State of Wisconsin, upon application duly made on his behalf, the said A. Pearce Tomkins was, by an order of Hon. James McCully, County Judge for said Ashland County, in which county said infant then resided and now resides, duly appointed guardian of the plaintiff, for the purposes of this action, and that he is also the general guardian of the property and estate of said infant.

3. That on October 1, 1901, the said Antoine G. Starr was a Chippewa Indian of the Lake Superior, residing upon the Bad River Indian Reservation in the State of Wisconsin, born within the jurisdiction of the United States of America, and on that day the President of the United States of America, in accordance with the provisions of the third article of a treaty concluded September 30th, 1854, with the Chippewa Indians of the Lake Superior and the Mississippi, approved the selection of said Antoine G. Starr, and assigned the same to him, being the West half of the Southeast quarter of section four (4) Township forty-six (46), North of Range three (3), west of the fourth principal meridian in the State of Wisconsin, and that the third article of said treaty was in words and figures as follows:

6 "Article three. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family, or a single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

By act of Congress approved Feb'y 11th, 1901, the right to allotments was extended to all Indians then residing on the La Pointe or Bad River Reservation, in Wisconsin, irrespective of age and condition.

4. That pursuant to such selection and allotment, and on the 29th day of June, A. D. 1905, the President, by virtue of the power and authority conferred upon him by said treaty, issued and delivered to said Antoine G. Starr, a patent to said land, a true copy of which patent is hereto attached, marked Exhibit "A" and made a part of this complaint. That said land exclusive of the merchantable timber standing thereon was then and now is of the value of $1000.00 and no more.

7 5. That on the 8th day of January, A. D. 1902, the said Antoine G. Starr signed his name to a certain written instrument, called a contract, a copy of which is hereto attached, marked Exhibit "B," and made a part of this complaint.

That in December 1902, the President made an order amending rule 7 set out in said contract by adding thereto as follows:

"If the Indian Agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit."

6. That between the 27th day of January 1902 and the 1st day of October 1905, and prior to the commencement of this action, the said Justus S. Stearns, named in said contract entered upon said land and cut and removed therefrom a large amount of standing timber of the value of at least Fifteen Thousand ($15,000.00) Dollars, which amount was prior to the commencement of this action paid to the said defendant, S. W. Campbell, for the use and benefit of this plaintiff, that of said amount said Campbell has paid to said

plaintiff the sum of Three Thousand One Hundred ($3100.00) Dollars and no more, and there is still in the said Campbell's possession the sum of Eleven Thousand Nine Hundred ($11900.00) Dollars so received by him for this plaintiff.

7. That on the 4th day of October 1905, and prior to the commencement of this action, the said A. Pearce Tomkins, as general guardian of the plaintiff, demanded of said defendant the sum of Eleven Thousand Nine Hundred ($11900.00) Dollars, and requested said defendant to pay the same in cash, or to deposit the same in some National Bank, and countersign a check for said amount in favor of the plaintiff, but defendant then and there refused, and still does refuse, so to do, and announces that he will only pay to the plaintiff or his guardian the sum of Ten dol-
8 lars per month, and claims the right to hold the said money and pay the same out as he may be directed to by the Commissioner of Indian Affairs.

8. That prior to the making of the order amending said rule number 7, it was and for many years had been the established custom and practice of the respective Indian Agents of the said La Pointe Indian Agency, to pay to the allottees under such timber contracts, the amounts payable under such contracts as fast as demanded by such allottees such payments being left entirely to said Indian Agents, the Commissioner of Indian Affairs in no manner interfering with, or attempting to control such payments, and that it was the said S. W. Campbell, who was appointed as such agent in July, A. D. 1898, who first adopted the rule and practice of limiting such payments to ten dollars per month, as he in his discretion thought best.

9. That the said S. W. Campbell, gives as his reason for refusing to pay said money or countersign a check for the same, that he has received instructions from the Commissioner of Indian Affairs not to allow allottees to draw more than Ten Dollars per month, under such contracts, unless otherwise directed by said Commissioner, while this plaintiff alleges that it does not fall within the scope of the authority of the Commissioner of Indian Affairs to interfere with the disposal of said money by the said Indian Agent, and no order given by said Commissioner can justify said Indian Agent in his refusal to pay said money to this plaintiff, or to countersign a check in his favor therefor, but that said general guardian so appointed under the laws of the State of Wisconsin is the proper party to determine how much shall be paid to and expended for this plaintiff.

10. That by reason of said failure and refusal of the said defendant to pay said money or to countersign a check therefor in favor of this plaintiff, the plaintiff is damaged in the sum of Eleven Thousand Nine Hundred ($11900) Dollars.

9 Wherefore the plaintiff demands judgment against the said defendant for the sum of Eleven Thousand Nine Hundred ($11900.00) dollars damages with interest from October 4, 1905, together with the costs of this action.

W. M. TOMKINS,
Attorney for Plaintiff.

10 Ex. "A."

4–454.

General Land Office Number 276.

The United States of America to all to whom these presents shall come, Greeting:

Whereas, There has been deposited in the General Land Office of the United States an order bearing date January 6, 1902, from the Secretary of the Interior, accompanied by a schedule with return dated September 27, 1901, from the office of Indian Affairs, containing a list of selections of land for certain Indians of the Bad River Reservation, as contemplated by the Treaty concluded September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi, whereby it appears that on the first day of October, 1901, the president, in accordance with the provisions of the third article of said Treaty, approved the selection of Antoine G. Starr, being the West half of the Southwest quarter of section four (4) Township forty-six (46), North of Range three (3) West, according to the Official Plat of the survey of said lands returned to the General Land Office by the Surveyor-General.

Now, know ye, That the United States of America, in consideration of the premises, and in conformity with the said Treaty, the order and return, with schedule aforesaid, have given and granted and by these presents, do give and grant, unto the said Antoine G. Starr, and to his heirs, the said tract above described; but with the stipulation that said Antoine G. Starr, and his heirs shall not sell, lease, or in any manner alienate said Tract without the consent of the President of the United States; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging unto the

11 said Antoine G. Starr, and to his heirs forever, provided, as aforesaid, that Antoine G. Starr, and his heirs shall not sell, lease, or in any manner alienate, said tract without the Consent of the President of the United States of America.

In testimony whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the City of Washington, the twenty-ninth day of June, in the year of our Lord one thousand nine hundred and five, and of the Independence of the United States the one hundred and twenty-ninth.

By the President:

T. ROOSEVELT.

By the Secretary:

F. M. McKEAN.

C. H. BRUSH,
Recorder of the General Land Office.

Recorded, Wisconsin, Vol. 380, Page 318.
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12 EXHIBIT "B."

Contract Between Bad River Indian, and Justus S. Stearns.

This Agreement, made and entered into at the La Pointe Agency, Wisconsin, this eighth day of January, 1902, between Antoine G. Starr, an Indian of the Bad River Reservation, party of the first part, and Justus S. Stearns, of Ludington, Michigan, party of the second part—

Witnesseth, That the said party of the first part agrees to sell to the party of the second part, under rules and regulations approved by the President of the United States, December 6, 1893, which are hereto attached and made a part of this contract, the merchantable timber of the kinds hereinafter specified, standing or fallen on the said Bad River Reservation, within the following described limits, viz:

W. ½ of the S. E. ¼, of Section four (4) Township forty-six (46) Range 3 West, the same being lands which have been allotted and conveyed by patent from the United States to the party of the first part under the provisions of the treaty of September 30, 1854.

The party of the second part agrees to cut and remove the said timber within the above described limits, and agrees to employ Indian labor in the cutting and removal of said timber, in preference to other labor on equal terms, whenever suitable Indian labor can be obtained.

13 For and in consideration of the foregoing, the said party of the second part also agrees to pay to the United States Indian Agent for the La Pointe Agency, in trust for said party of the first part, for all such timber cut upon the said described lands at the following rates, viz: 65 cents per thousand feet for shingle timber; $2.00 per thousand feet for merchantable dead pine; $5.00 per thousand feet for merchantable green white pine; $3.50 per thousand feet for green Norway pine; $1.00 per thousand feet for green or sound hemlock; $2.00 per thousand feet for merchantable basswood; $2.00 per thousand — for merchantable elm; $2.00 per thousand feet for merchantable maple; $2.00 per thousand feet for merchantable birch, and $4.00 per thousand feet for merchantable oak, according to the scale that shall be made by a competent scaler selected for that purpose by the mutual agreement of the parties thereto, whose selection shall be approved by the agent of the La Pointe Indian Agency, and full payment of said timber to be made before it is removed from the land hereinbefore described, and the title to the logs shall not vest in the party of the second part until full payment shall have been made therefor.

And, further, said party of the second part also agrees to pay to said Indian Agent as aforesaid the sum of Fifty dollars on the signing and delivery of this contract, and after its approval by the Commissioner of Indian Affairs, and to pay annually, beginning one year from the date of this contract, until such timber is cut and removed from said land, a sum equal to five per centum of the contract

price of said timber upon an estimate to be made by some competent estimator to be agreed upon between said second parties and the Indian agent of such agency, such payments to apply on such purchase price and to be deducted from the price of the timber when cut and removed as aforesaid.

It is hereby understood and agreed that the cost of scaling shall be equally divided between the parties of the first and second part.

14 It is further agreed that said timber shall be cut and removed from said land as soon as practicable after the date of this contract, reference being had to other similar contracts held or to be held by said second party, and to the condition of the timber on said described tract, so that no depreciation in value or waste may accrue to said first party by delay in cutting, provided that the terms of this contract shall not extend beyond the period of fifteen years from the date hereof.

It is further understood and agreed by the party of the second part that this agreement is void and of no effect unless approved by the Commissioner of Indian Affairs.

That the party of the second part is firmly bound for the faithful compliance with the stipulations of this contract by and under the bond made and executed by Justus S. Stearns, as principal, and the City Trust, Safe Deposit and Surety Company of Philadelphia, as surety, entered into the 2nd day of January, 1895, and now on file in the office of the Commissioner of Indian Affairs.

ANTOINE G. STARR, [SEAL.]
Party of the First Part.
JUSTUS S. STEARNS. [SEAL.]

In presence of
R. U. BAUGHMAN.
E. B. HILL.

15 Attached to said contract is the following modification and approval:

For value received and in consideration of the approval by the Commissioner of Indian Affairs, as hereby modified, of the annexed original contract between Antoine G. Starr, an Indian of the Bad River Reservation, party of the first part, and Justus S. Stearns, party of the second part; the undersigned, said Justus S. Stearns, hereby agrees to pay to the United States Indian Agent at the La Pointe Indian Agency, in trust for said party of the first part for all timber cut on the lands therein described, the following rates, viz:

All	Merchantable	White Pine	$8.00	per	thousand
"	"	Norway	8.00	"	"
"	"	Hemlock	1.50	"	"
"	"	Elm	2.00	"	"
"	"	Bass	4.00	"	"
"	"	Birch	3.50	"	"
"	"	Oak	6.00	"	"
"	"	Maple	3.00	"	"

These prices to cover all the merchantable timber on the land, whether green, dead, down or burnt, existing in each and every log of the different varieties named.

And said Justus S. Stearns hereby ratified and adopts said original contract as hereby modified and agrees that the same shall be in every particular and in all its terms be binding and in force against him, with the modification as to the schedule of prices by this supplemental agreement fixed and determined.

JUSTUS S. STEARNS. [SEAL.]

In presence of—
KATE F. WHITEHEAD.

DEPARTMENT OF THE INTERIOR.
OFFICE OF INDIAN AFFAIRS, *May* 23, 1903.

The within contract is hereby approved, subject to the regulations approved by the President, Dec. 29, 1902, as herein modified.

M. C. TONNER,
Acting Commissioner.

16 *Rules and Regulations Approved by the President December 6, 1893, under which the Prefixed Certificate is Made.*

1. The Indians of the La Pointe (or Bad River) Reservation, in the State of Wisconsin, to whom allotments have been made and patents therefor issued, as shown by a schedule hereto appended, are hereby authorized to sell on stumpage all the timber standing or fallen on their respective allotments to Justus S. Stearns, of Ludington, Michigan, under the supervision of the United States Indian Agent for the La Pointe Agency; provided that said Justus S. Stearns shall establish a mill on the reservation for the manufacture of said timber into lumber and shingles, and shall give bond in a sufficient sum to be fixed by the Commissioner of Indian Affairs, subject to the approval of the Secretary of the Interior, conditioned for the faithful observation of all the laws of the United States now in force, or that may hereafter be enacted, relative to trade and intercourse with the Indian, and the regulations prescribed or that may be prescribed thereunder; for the purchase of the timber from such of the Indian allottees as desire to sell the same and will enter into contract therefor, at not less than the following prices per thousand feet, viz:

Shingle timber, sixty-five (65) cents per thousand.
Merchantable dead pine, two (2) dollars per thousand.
Merchantable green white pine, four (4) dollars per —.
Green Norway pine, two (2) dollars per thousand.
Green or sound hemlock, one (1) dollar per thousand.
Merchantable Basswood, two (2) dollars per thousand.
Merchantable elm, two (2) dollars per thousand.
Merchantable maple, two (2) dollars per thousand.
Merchantable Birch, two (2) Dollars per thousand.
Merchantable oak, four (4) dollars per thousand.

2. Before any timber shall be cut under the foregoing authority from any allotted tract, a contract shall be entered into between the said Justus S. Stearns and the Indian to whom such allotted tract has been patented, in such form as shall be prescribed by the Commissioner of Indian Affairs, which contract, however, shall
17 not be of force until the Commissioner of Indian Affairs shall have endorsed his approval thereon, which approval shall operate as specific consent of the Executive to the sale of the timber to which the contract relates.

3. The Indian Agent for the La Pointe Agency, Wisconsin, shall see that the said Justus S. Stearns shall employ Indians in the cutting, moving and manufacturing of timber when practicable, on the same terms as other labor, and said Justus S. Stearns shall agree to employ Indians who may be willing to work in doing the logging authorized hereby.

4. The Indian Agent shall be authorized for and on behalf of the Indians of the La Pointe (or Bad River) Reservation to enter into contracts from time to time with said Justus S. Stearns for the sale on stumpage of the dead and down timber on the unallotted lands of said reservation, which contract shall specify by legal subdivisions the portion of the reservation authorized to be cut over thereunder, and shall be approved by the Commissioner of Indian Affairs in like manner as is provided for the approval of the contracts of individual Indians for the sale of timber on the allotted lands; but no contract made in pursuance of this regulation shall be construed as authorizing the sale or removal of any timber heretofore cut under any authority or pretended authority of any contract, where such timber is in litigation in any of the courts or before any of the Executive Departments.

5. No green or growing timber shall be cut or removed from the unallotted lands of the reservation, and any violation of this provision by said Justus S. Stearns will subject him to liability to prosecution and punishment under section 5388 of the Revised Statutes as amended by Act of June 4, 1888. (25 Stats. 166) as well as forcible removal from the reservation, and suit on his bond, and shall work also as a forfeiture of all contract for timber, on the
18 reservation and rights under such contracts.

6. One half of the cost of scaling shall be paid by said Justus S. Stearns, and the other half shall be paid from the proceeds of the sale of the timber.

7. After deducting one half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber sold from the unallotted portions of the reservation shall be paid to the Indian Agent, to be expended for the relief and benefit of the Indians of the Reservation under the direction of the Commissioner of Indian Affairs, and the proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the Allotment, countersigned by the Indian agent of the La Pointe Agency, unless otherwise stipulated in contracts with particular Indians.

8. The farmer in charge of the reservation shall, under the direction of the Agent, be required to supervise the logging on the reservation under these regulations, to the end that no injustice is done the Indians, and no green or growing timber is cut and removed except in accordance with these regulations, and all moneys for stumpage shall be paid to him or the Agent, in trust for the Indians or Indian owner, to be by him deposited or accounted for according to the foregoing regulations, unless otherwise stipulated in the contract with such Indian owner.

18½ [Endorsed:] 148. State of Wisconsin, U. S. Circuit Court, Western District. Antoine G. Starr, by A. P. Tomkins, his guardian, plaintiff, vs. S. W. Campbell, defendant. Complaint. Filed June 19, 1906. F. W. Oakley, clerk.

19 United States Circuit Court, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. P. TOMKINS, His Guardian, Plaintiff,

—.

S. W. CAMPBELL, Defendant.

And now comes the above named defendant by William G. Wheeler and Henry H. Morgan, his attorneys, and demurs to the complaint in the above entitled action, for the reason that it appears upon the face thereof, that said complaint does not state facts sufficient to constitute a cause of action against this defendant.

WILLIAM G. WHEELER,
HENRY H. MORGAN,
United States Attorneys for Defendant.

19½ [Endorsed:] 148, Law C. United States Circuit Court, Western District of Wisconsin. Antoine G. Starr, an infant, by A. P. Tomkins, his guardian, plaintiff, *vs.* S. W. Campbell, defendant. Demurrer. Filed June 19, 1906. F. W. Oakley, clerk.

20 United States Circuit Court, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by His Guardian, A. PEARCE TOMKINS, Plaintiff,

vs.

SAMUEL W. CAMPBELL, Defendant.

The treaty with the Chippewa Indians of Lake Superior and the Mississippi, of September 30, 1854, contains the following provision: The President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue

patents therefore to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart.

By virtue of this provision the President has made rules and regulations concerning the alienation or sale of the standing timber upon the tracts mentioned in the complaint, and from such sale the moneys claimed by the plaintiff were derived. In view of the power given to the President by the treaty, and the execution of such
21 power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Interior Department, and is held in trust by the United States for the plaintiff's benefit; and that the demurrer interposed to the complaint should be sustained.

Dated June 19th, 1906.

A. L. SANBORN, *Judge.*

21½ [Endorsed:] No. 148. In the United States Circuit Court, Western District of Wisconsin. Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, plaintiff, *vs.* Samuel W. Campbell, defendant. Order sustaining demurrer. Filed June 19, 1906. F. W. Oakley, clerk.

22 In United States Circuit Court, Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by His Guardian, A. PEARCE TOMKINS, Plaintiff,

vs.

SAMUEL W. CAMPBELL, Defendant.

This cause being heard this day upon the demurrer of the defendant to the complaint of the plaintiff *and* was argued by counsel and the court being fully advised in the premises, is of the opinion and does therefore order that said demurrer be, and the same is hereby sustained, to which ruling of the court said plaintiff, by his counsel, excepts.

And thereupon, the plaintiff not asking to plead farther, but declining so to do, it is considered by the court that the plaintiff take nothing by his suit, but that the defendants go hence without day and recover from the plaintiff *their* costs herein expended.

Dated June 19th, 1906.

By the Court:

A. L. SANBORN, *Judge.*

22½ [Endorsed:] No. 148. In the United States Circuit Court, Western District of Wisconsin. Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, plaintiff, *vs.* Samuel W. Campbell, defendant. Judgment. Filed June 19, 1906. F. W. Oakley, clerk.

On the same day, the plaintiff made and filed an assignment of error-, being as follows:

23 The Circuit Court of the United States for the Western District of Wisconsin. At Law.

ANTOINE G. STARR, an Infant, by His Guardian, A. PEARCE TOMKINS, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

Assignment of Errors.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors which he avers occurred upon the trial of the cause, to-wit:

1. The court erred in sustaining the defendant's demurrer to the plaintiff's complaint herein.

2. The court erred in entering judgment in favor of the defendant and against the plaintiff.

W. M. TOMKINS,
Attorney for Plaintiff.

Filed Sept. 26, 1906.
F. W. OAKLEY, *Clerk.*

On the same day the plaintiff filed his prayer for a writ of error herein, as follows:

24 The Circuit Court of the United States for the Western District of Wisconsin. At Law.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

Petition for Writ of Error.

And now comes Antoine G. Starr, an infant, by A. Pearce Tomkins, his guardian, plaintiff herein, and says that on or about the 19th day of June, A. D. 1906, this court entered judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf to the United States Supreme Court, for the correction of errors so complained of, and that a transcript of the record, pro-

ceedings, and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

W. M. TOMKINS,
Attorney for Plaintiff.

Filed Sept. 26, 1906.
F. W. OAKLEY, *Clerk.*

On the same day the court made its order allowing the said writ of error, in the words and figures following, to-wit:

25 Circuit Court of the United States for the Western District of Wisconsin. At Law.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

Order Allowing Writ of Error.

This 25th day of Sept. A. D. 1906, came the plaintiff by his attorney, filed herein and presented to the court his petition, praying for the allowance of a writ of error intended to be urged by him, praying also, that a transcript of the record, proceedings and papers upon which the judgement herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the court does allow the writ of error upon the plaintiff giving bond according to law, in the sum of Five Hundred Dollars, which shall operate as a supersedeas bond.

A. L. SANBORN, *Judge.*

Filed Sept. 26, 1906.
F. W. OAKLEY, *Clerk.*

That on the same day in compliance with the foregoing order a writ of order was filed with the Clerk of said Court, which is as follows, to-wit:

26 *Writ of Error.*

THE UNITED STATES OF AMERICA:

The President of the United States to the Honorable Judge of the Circuit Court of the United States for the Western District of Wisconsin, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment, of a plea which is in the said circuit court, before you or some of you, between Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, plaintiff, and Samuel W. Campbell,

defendant, a manifest error hath happened, to the great damage of the said plaintiff, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme court of the United States, together with this writ, so that you have the same at Washington, on the 25th day of Oct. next, in the said Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of Sept., in the year of our Lord one thousand nine hundred and six, and of the Independence of the United States the one hundred and thirty-first.

[Seal U. S. Circuit Court, Western District of Wisconsin.]

(Signed) ALFRED HARRISON,
Clerk of the United States Circuit —
for the Western District of Wisc.

The foregoing writ is hereby allowed.

(Signed) A. L. SANBORN, *Judge.*

[Endorsed:] Filed Sep. 26 1906 F. W. Oakley, Clerk.

27 WESTERN DISTRICT OF WISCONSIN, *ss:*

In obedience to the within writ, I herewith transmit to the United States Supreme Court a true and complete transcript of the record and proceedings in the foregoing entitled clause, this 4th day of October, 1906.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY,
Clerk of the Circuit Court of the United States,
for the Western District of Wisconsin.

Copy deposited for the defendant in error in the office of the Clerk of the Circuit Court of the United States, for the Western District of Wisconsin.

Filed Sept. 26, 1906.

F. W. OAKLEY, *Clerk.*

Afterwards, on the same day, there was filed in the office of the Clerk of said Court, a bond on said writ of error, which is as follows:

28 The Circuit Court of the United States for the Western District of Wisconsin.

ANTOINE G. STARR, an Infant, by A. PEARCE TOMKINS, His Guardian, Plaintiff,
vs.
SAMUEL W. CAMPBELL, Defendant.

Bond on Writ of Error.

Know all men by these presents, that we, Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, as principal, and Peter Lamal and William Kellogg, as sureties, are held and firmly bound unto the defendant, Samuel W. Campbell, in the full and just sum of Five Hundred Dollars to be paid to the said defendant, Samuel W. Campbell, his certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals, and dated this 25th day of Sept., in the year of our Lord one thousand nine hundred and six.

Whereas, lately at a circuit court of the United States for the Western District of Wisconsin, in a suit depending in said court, between Antoine G. Starr, an infant, by A. Pearce Tomkins, his guardian, plaintiff, and Samuel W. Campbell, defendant, a judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Samuel W. Campbell,
29 citing and admonishing him to be and appear at a session of the Supreme Court of the United States, to be holden at the city of Washington, on the eight- day of October, A. D. 1906.

Now, the condition of the above obligation is such, that if the said plaintiff shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

A. PEARCE TOMKINS. [SEAL.]
PETER LAMAL. [SEAL.]
WILLIAM KELLOGG. [SEAL.]

Sealed in presence of—
W. M. TOMKINS.
JOHN GARVIN.

Approved by
A. L. SANBORN,
Circuit Judge.

[Endorsed:] Filed Sep. 26 1906 F. W. Oakley, Clerk.

30 Circuit Court of the United States for the Western District of Wisconsin.

I, F. W. Oakley, Clerk of said Circuit Court, do hereby certify and return to the United States Supreme Court, that the foregoing consisting of thirty one pages numbered consecutively from one to thirty-one inclusive, is a true and correct transcript of the process, pleadings, orders, final judgment, and all other proceedings in said clause, and of the whole thereof, as appears from the original record and files of said court, except that the same contains the original bond, writ of error and citation, together with proof of service thereof. In witness whereof, I have hereunto set my hand and affixed the *seal* of said court, at Madison, in said District, this 4th day of October, 1906.

[Seal U. S. District Court, Western Dist. of Wisconsin, Madison.]

F. W. OAKLEY, *Clerk.*

31 UNITED STATES OF AMERICA, *ss:*

To Samuel W. Campbell, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden in the city of Washington, on the eight- day of October, nineteen hundred and six, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States, for the Western District of Wisconsin, wherein Antoine G. Starr, an infant, by A. Pearce Tomkins, his guardian, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

A. L. SANBORN, *Judge.*

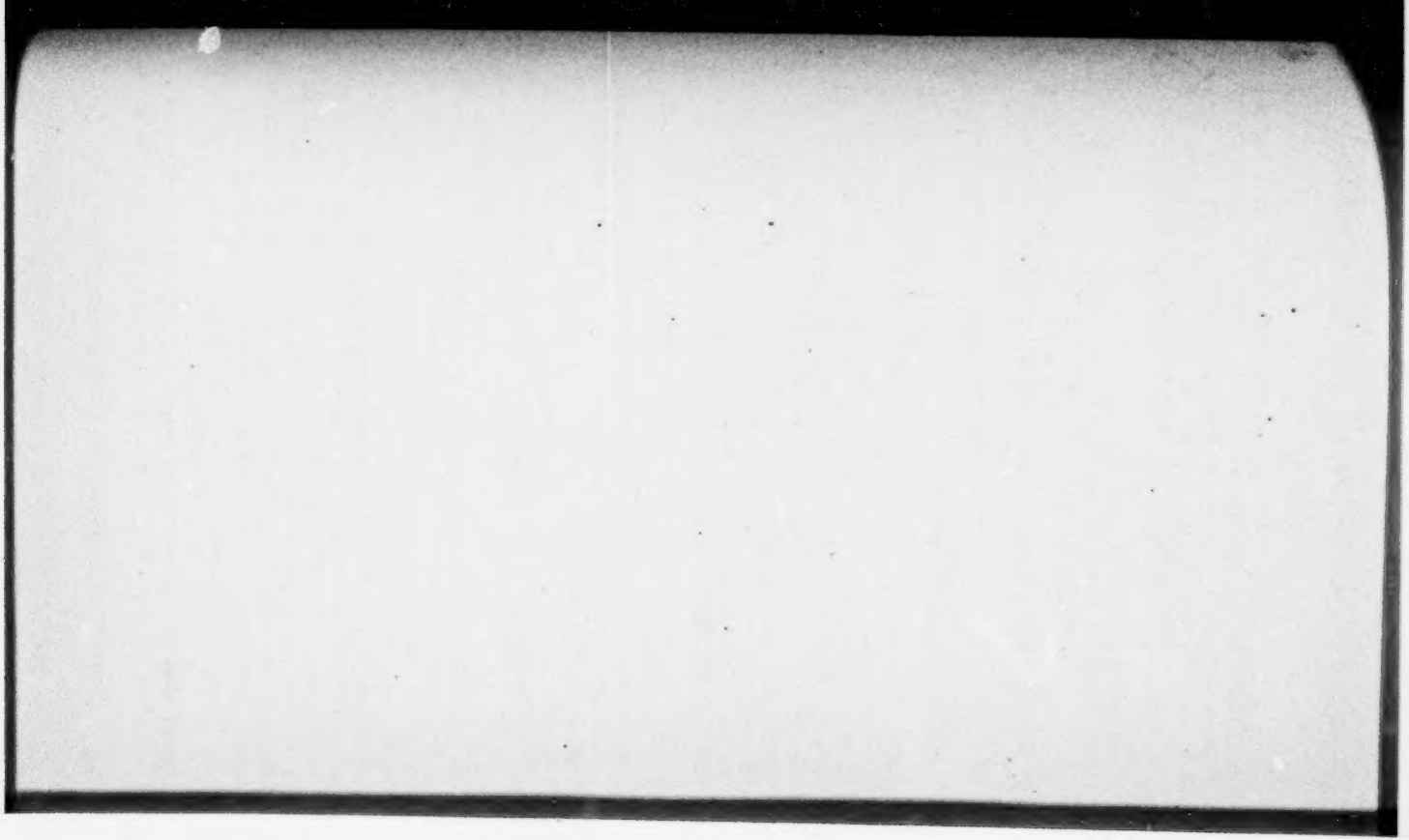
Dated this 25th day of Sept., 1906.

Due service of the foregoing citation admitted this 25th day of Sept. A. D. 1906.

WILLIAM G. WHEELER,
United States Attorney,
Western District of Wisconsin.

[Endorsed:] Filed Sep. 26 1906 F. W. Oakley, clerk.

Endorsed on cover: File No. 20,420. W. Wisconsin C. C. U. S. Term No. 132. Antoine G. Starr, an infant, by his guardian, A. Pearce Tomkins, plaintiff in error, *vs.* Samuel W. Campbell. Filed October 15th, 1906. File No. 20,420.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 132.

ANTOINE G. STARR, AN INFANT, BY HIS GUARDIAN, A. PEARCE TOMKINS, PLAINTIFF IN ERROR,

vs.

SAMUEL W. CAMPBELL.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The learned solicitor general, in his brief, apparently relies upon these two propositions:

1. That the citizenship of the plaintiff in error is immaterial.

2. That the restriction on alienation embraces the sale of standing timber.

It would seem that the Heff case is a complete answer to the first proposition, and the Paine Lumber Co. case to the second.

I.

Prior to the passage of the act of February 8, 1887 (24 Stat., 388) and the conferring of citizenship thereunder, "the recognized relation between the Government and the Indians was that of a superior and an inferior, whereby the latter was placed under the care and control of the former" (Choctaw Nation *v.* United States, 119 U. S., 1, 28).

Speaking of these non-citizen Indians, this court said in Lone Wolf *v.* Hitchcock, 187 U. S., 553, 567: "These Indian tribes *are* the wards of the nation. They are communities *dependent* on the United States. Dependent largely for their daily food. Dependent for their political rights. They owe no allegiance to the States, and they receive from them no protection."

Under those circumstances, unquestionably the Government was the guardian of the person and estate of such Indians. The Department based its right to control the sale of the timber upon this relation of guardian and ward. As stated in our original brief, Secretary Bliss said: "The United States has no interest whatever in the lands nor in the timber except as the guardian of the Indians."

Prior to the decision of this court in the Heff case, the Department placed its right to control the sale of timber and its proceeds on the broad proposition that the Indians although citizens were still the wards of the Government and under Federal control.

This court in the Heff case holds and counsel for defendant and *amicus curiæ* concede, that the Indian allottees are emancipated from Federal control as to their civil and political rights and status.

It would seem to follow, that whatever control remains in the Department is by virtue of the condition contained in the patent and by that alone. We presume it will be admitted that the President conformed strictly to the terms of the treaty as to the form of the condition contained in these patents. This condition is simple, and speaks for itself.

2.

This brings us to the second proposition urged by counsel for defendant, that the restriction on alienation embraces the sale of the standing timber.

The decision of this court in the Paine Lumber Co. case, we submit, answers this question in favor of the plaintiff. It was there squarely held that the restraint upon the alienation of the land did not extend to a restraint upon the sale of the timber.

Counsel while criticizing the decision in that case concede that where the timber is cut and sold without the consent of the President, the United States cannot interfere and has no cause of action against the party receiving the timber. This is true, for as said by this court in Schrimpscher *v.* Stockton, *supra:* "a violation of the condition of the patent would not redound to the benefit of the United States, or enable it to repossess the lands."

The Indian patentee has the right to cut the timber and sell it, there is no restriction upon such use. The United States would have no title or interest in the logs or the lumber manufactured therefrom, or in the money derived from the sale thereof.

Counsel for defendant apparently attempt to draw a distinction between a case where the timber is cut and sold without the consent of the President and one where the sale is made with such consent. This we apprehend is a distinction without a difference.

The learned district judge who decided the demurrer in this case and rendered judgment against the plaintiff, later found himself confronted by this same distinction, and felt compelled to hold that "the Indian has simply undertaken to sell the timber without any right so to do, and the purchaser has taken it off and sold it to other persons. The sole right of action is in the Indian allottees. There seems to be nothing upon which a trust relation can be founded. The

late case of United States *v.* Paine Lumber Co., seems to be decisive of the questions here involved."

United States *v.* Auger *et al.*, 153 Fed., 671.

The Indian citizen does not draw such fine and technical distinctions. He will be satisfied to cut the timber himself, and then dispose of it and collect the proceeds himself, rather than to enter into a formal contract, approved by the President, in which case he will have doled out to him ten dollars or more a month as shall seem best to the local agent or some clerk in the Department.

Limitations and restrictions on the use of property are not favored, and although they will be enforced when the intent is clear, ordinarily all doubts will be resolved against them.

Wakefield *v.* Van Tassell, 95 Am. St. Rep., 207, note A, p. 214.

Klaer *v.* Ridgeway, 86 Pa. St., 529.

Dunbar *v.* Sticker, 45 Iowa, 384.

It is difficult to understand how a condition that the grantee shall not sell, lease or in any manner alienate the tract of land described, is violated by cutting and removing the timber standing thereon.

In the Paine Lumber Co. case it was urged that the title to the land was held in trust by the United States, and that as such trustee it should control the sale of the timber, but this court held that: "The land is not the land of the United States, and the timber when cut does not become the property of the United States." With much more force can that language be applied to the case at bar, where the legal title to the land and timber is unquestionably in the plaintiff.

This court, in the Paine Lumber Co. case, said: "The restraint upon alienation must not be exaggerated."

To say that the cutting and removal of the timber by the Indian is an alienation of the tract of land from which such timber is cut and removed, would certainly be a gross exaggeration. What the Indian can do himself, he can

certainly delegate the right to do to another, and in this case by a mere verbal license.

Much stress is placed by counsel for defendant upon the provision in the Dawes' act, that the citizenship conferred is "without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

Plaintiff does not claim that the condition against alienation is affected by citizenship. The condition does not provide for a guardianship, it simply restrains the grantee from alienating the tract of land without the consent of the President. When that consent is obtained the condition is terminated.

That the Department bases its claim to control the proceeds of the sales of timber upon the ground that the relation of guardian and ward still exists between the Government and the Indian citizen, is shown by the citation on page 18 of the brief of the learned solicitor general, from the report of Indian Agent Mercer in 1893. From that report it appears that the Department claimed the right to control the disposition of the dead and down timber on these allotments. This timber was certainly personal property and not a part of the land.

In reply to the contention of the counsel *amici curiæ*, that the Indian agent and not the guardian appointed under the State law has control of these funds of the minor we call attention to section 6 of the Dawes' act which provides: "That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside."

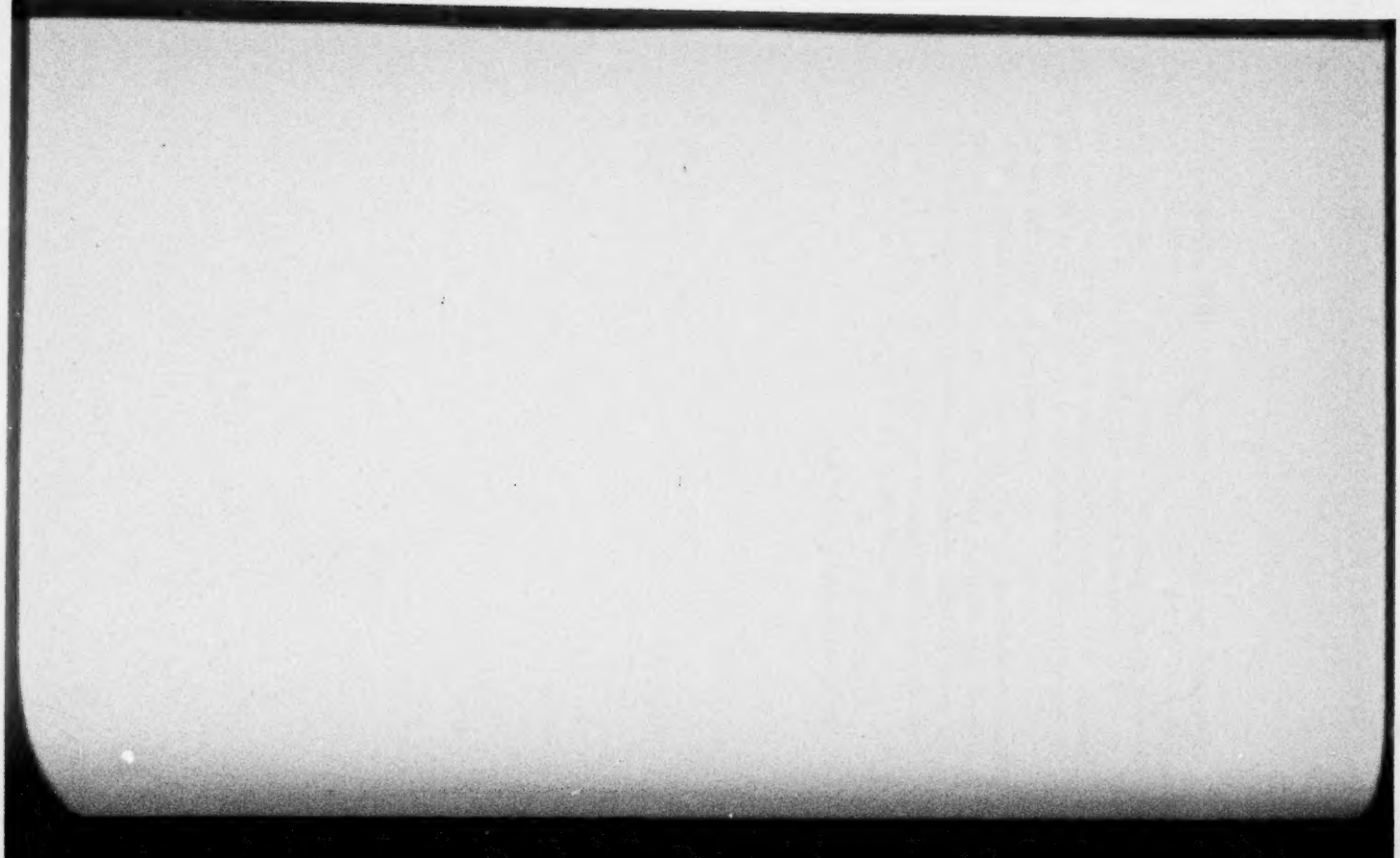
This would seem to be in conflict with the rule of the Interior Department that the Indian agent under the direction of the Commissioner shall control the funds of the minor and pay it out in such manner as to him shall seem proper.

If such conflict exists the rule of the Department must give way to the laws of the State.

As bearing upon this question we cite the case of Morrison *et al. v.* Burnette *et al.*, 154 Fed., 617, in which it is held that a regulation of the Interior Department is effective in so far as it is sustained by the acts of Congress, and is ineffectual so far as it is in conflict with them. This was said as to the approval of leases of allotments of Indian minors by the Secretary of the Interior.

We apprehend that under the laws of the State and the act of Congress the guardian of this plaintiff has the sole right to collect and disburse the money derived from the timber cut and removed from his land, whether such timber was lawfully or unlawfully taken therefrom.

W. M. TOMKINS,
Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1907.

No. 132.

ANTOINE G. STARR, AN INFANT, BY A. PEARCE TOMKINS, HIS GUARDIAN, PLAINTIFF IN ERROR,

vs.

SAMUEL W. CAMPBELL, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN

BRIEF FOR PLAINTIFF IN ERROR

STATEMENT OF CASE.

In Error to the Circuit Court of the United States for the Western District of Wisconsin to review a judgment sustaining a demurrer in an action by the plaintiff an Indian allottee to

recover certain moneys collected by the defendant who is Indian agent, for timber cut from plaintiff's allotment.

The complaint in substance alleges :

That the plaintiff is an infant and that A. Pearce Tomkins is his duly appointed general guardian and guardian ad litem ; that plaintiff is a Chippewa Indian of the Lake Superior, residing on the Bad River Indian Reservation in the State of Wisconsin, born within the jurisdiction of the United States of America, and that the President of the United States of America, in accordance with the provisions of the third article of a treaty concluded September 30th, 1854, with the Chippewa Indians of the Lake Superior and the Mississippi, approved the selection of said Antoine G. Starr, and assigned the same to him, being the West half of the Southeast quarter of Section four (4), Township forty-six (46), North of Range three (3) West of the fourth principal meridian in the State of Wisconsin, and that the third article of said treaty was in words and figures as follows :

"Article 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family, or a single person over twenty-one years of age, eighty acres of land for his or their separate use ; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also at his discretion, make rules and regulations respect-

ing the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

That by Act of Congress approved February 11th, 1901, the right to allotment was extended to all Indians then residing on the La Pointe or Bad River Reservation, in Wisconsin, irrespective of age and condition.

That pursuant to such selection and allotment, and on the 29th day of June, A. D. 1905, the President, by virtue of the power and authority conferred upon him by said treaty, issued and delivered to said Antoine G. Starr, a patent to said land, which patent did give and grant to said plaintiff the said tract of land, "to have and to hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging unto the said Antoine G. Starr, and to his heirs forever, provided as aforesaid, that Antoine G. Starr and his heirs shall not sell, lease, or in any manner alienate said tract without the consent of the President of the United States of America."

That said land exclusive of the merchantable timber standing thereon was then and now is of the value of One Thousand Dollars ($1000.00) and no more.

That on the 8th day of January, A. D. 1902, the said Antoine G. Starr signed his name to a certain written instrument, called a contract, by which he purported, with the approval of the President, to sell to Justus S. Stearns, under rules and regulations approved by the President of the United States, December 6th, 1893, which are hereto attached and made a part of this contract, the merchantable timber of the kinds therein specified, standing or fallen on the said land; the said Justis S. Stearns agreed to pay to the United States Indian Agent for the La Pointe Agency, in trust for said party of the first part, for all such timber cut upon the said described lands a specified sum per thousand feet.

The rules and regulations in so far as they are claimed by defendant to affect the issues in the case are as follows:

"Rule 7. After deducting one half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the allotment, countersigned by the Indian Agent of the La Pointe Agency, unless otherwise stipulated in contracts with particular Indians."

"If the Indian Agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be be permitted to withdraw from deposit."

That between the 27th day of January, 1902 and the 1st day of October, 1905, and prior to the commencement of this

action, the said Justus S. Stearns, named in said contract entered upon said land and cut and removed therefrom a large amount of standing timber of the value of at least Fifteen Thousand Dollars ($15,000.00), which amount was prior to the commencement of this action paid to the said defendant, S. W. Campbell, for the use and benefit of this plaintiff, that of said amount said Campbell has paid to said plaintiff the sum of Three Thousand One Hundred Dollars ($3,100.00) and no more, and there is still in said Campbell's possession the sum of Eleven Thousand Nine Hundred Dollars ($11,900.00) so received by him for this plaintiff.

That on the 4th day of October, 1905, and prior to the commencement of this action, the said A. Pearce Tomkins, as general guardian of the plaintiff, demanded of said defendant the said sum of Eleven Thousand Nine Hundred Dollars ($11,900.00), and requested said defendant to pay the same in cash, or to deposit the same in some National Bank, and countersign a check for said amount in favor of the plaintiff, but defendant then and there refused and still does refuse so to do, and announces that he will only pay to the plaintiff or his guardian the sum of Ten Dollars (10.00) per month, and claims the right to hold the said money and pay the same out as he may be directed to by the Commissioner of Indian Affairs.

That prior to the making of the order amending said rule number 7, it was and for many years had been the established custom and practice of the respective Indian Agents of the said La Pointe Agency, to pay to the allottees under such timber contracts, the amounts payable under such contracts

as fast as demanded by such allottees, such payments being left entirely to said Indian Agents, the Commissioner of Indian Affairs in no manner interfering with, or attempting to control such payments, and that it was the said S. W. Campbell, who was appointed as such Indian agent in July, A. D. 1898, who first adopted the rule and practice of limiting such payments to ten dollars per month, as he in his discretion thought best.

That the said S. W. Campbell gives as his reason for refusing to pay said money or countersign a check for the same, that he has received instructions from the Commissioner of Indian Affairs not to allow allotttees to draw more than ten dollars per month, under such contracts, unless otherwise directed by said Commissioner, while this plaintiff alleges that it does not fall within the scope of the authority of the Commissioner of Indian Affairs to interfere with the disposal of said money by the said Indian Agent, and no order given by said Commissioner can justify said Indian Agent in his refusal to pay said money to this plaintiff, or to countersign a check in his favor therefor, but that said general guardian so appointed under the laws of the State of Wisconsin is the proper party to determine how much shall be paid to and expended for this plaintiff.

That by reason of said failure and refusal of the said defendant to pay said money or to countersign a check therefor in favor of this plaintiff, the plaintiff is damaged in the sum of Eleven Thousand Nine Hundred Dollars ($11,900.00).

WHEREFORE the plaintiff demands judgment against the said defendant for the sum of Eleven Thousand Nine

Hundred Dollars ($11,900.09) damages with interest from October 4th, 1905, together with the costs of the action.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action.

The court below sustained the demurrer, and the plaintiff standing upon his demurrer, entered judgment dismissing the action with costs. The court below made and filed the folowing decision :

"The treaty with the Chippewa Indians of Lake Superior and the Mississippi, of September 30th, 1854, contains the following provision :

'The President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use ; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart'.

By virtue of this provision the President has made rules and regulations concerning the alienation or sale of the stand-

ing timber upon the tracts mentioned in the complaint, and from such sale the moneys claimed by the plaintiff were derived. In view of the power given to the President by the treaty, and the execution of such power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Interior Department, and is held in trust by the United States for the plaintiff's benefit; and that the demurrer interposed to the complaint should be sustained."

ERRORS RELIED UPON.

The Court below erred:

1. In sustaining the demurrer to the complaint.

2. In entering judgment in favor of the defendant.

3. In refusing to enter judgment for the plaintiff as prayed for in the complaint.

BRIEF OF ARGUMENT.

The first question which naturally presents itself, is as to the jurisdiction of this court on writ of error to the Circuit Court.

The plaintiff's right to recover in this action depends upon the construction of Article 3 of the Treaty of September 30th, 1854, between the United States and the Chippewa Indians of Lake Superior and the Mississippi.

It is true a patent has been issued by the President of the

United States to the plaintiff, which contains only the simple restriction upon alienation, that the grantee shall not sell, lease or in any manner alienate the tract of land conveyed, without the consent of the President. But the patent is not conclusive, except in so far as it conforms to the treaty, in fact is of no effect if in conflict with the treaty.

Ladiga v. Roland, 43 U. S. 591,
Jones v. Meehan, 175 U. S. 21,
Chamberlain v. Marshal, 8 Fed. 409.

In Pickering vs. Lomax, 145 U. S. 591, the treaty and the patent issued under it, were nearly identical with those in the case at bar, A question was raised in that case as to the jurisdiction of the Supreme Court.

It was held that the proviso in the treaty continued to be operative, so long as the land was owned by the grantees or their heirs, and that the object of carrying the proviso into the patent was to apprise intending purchasers of the restrictions imposed upon the alienation of the lands, and that this court had jurisdiction.

The rights of the Indians to these lands are based upon the Treaty of Sept. 30th, 1854.

The defendant contended in the court below, that by the treaty there were restrictions placed upon alienation, and a certain control retained over the allottee, and his allotment, not found in the patent.

As we read the treaty a large discretion was given to the president as to what restriction on alienation, if any, should be put into the patent.

If he had thought the particular allottee capable of transacting his own affairs and caring for himself, and especially if the allottee was to become a citizen, he might issue a patent without any restriction upon alienation. He was empowered by the treaty to issue patents "with such restrictions of the power of alienation as he might see fit to impose."

He did issue a patent to the plaintiff and his heirs, "with all the rights, privileges, immunities and appurtenances of whatsoever nature thereunto belonging." The only restriction in the patent being that said "Antoine G. Starr and his heirs shall not sell, lease, or in any manner alienate said tract without the consent of the President of the United States of America."

The defendant relied, in this contention, upon the following language in the treaty, "and he (the president) may also in his discretion, make rules and regulations respecting the disposition of the land in case of the death of the head of the family or single person occupying the same, or in case of its abandonment by them."

A conclusive answer to this contention is, we think,—

1. No such contingency has arisen in this case.

2. A fair construction of this provision would seem to be, that it had reference solely to allotments before patent, and while the legal title was still in the United States.

3. The president in the patent has provided that the land shall go to the heirs of the allottee.

The same is true as to the provision in the treaty that "he (the president) may also assign other lands in exchange

for mineral lands, if any such are found in the tracts herein set apart."

This must refer to allotments prior to patent. To hold otherwise would give the president the power to cancel a patent and assign another tract of land, after such patent has issued, and the land had been sold and conveyed to a third party with the president's consent.

A treaty should be construed not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians.

Jones vs. Meehan, 175 U. S. 21.

The learned Judge in the court below, seems to have followed the construction of the treaty contended for by the defendant, for in his opinion he says "In view of the power given to the President by the treaty and the execution of such power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Indian Department, and is held in trust by the United States for the plaintiff's benefit; and that the demurrer to the complaint should be sustained."

It seems clear then that the construction of this treaty is in drawn question in this case, and it is properly taken to this Court.

Ornelas vs. Ruiz, 161 U. S. 502.

The court having acquired jurisdiction of this case because the construction of the treaty is drawn in question, has the power to dispose of the entire case, including all questions, whether of jurisdiction or of merits.

Chappell v. United States, 160 U. S. 499.

The controversy involved in this case necessarily calls for the construction of the treaty relied upon by claimant, the writ of error, therefore, is properly direct from the Supreme Court of the United States to the Circuit Court.

Mitchell v. Furman, 180 U. S. 402.

2.

As in the case lately decided in this court, of United States v. Paine Lumber Co. (206 U. S. 467) the primary issue seems to be, whether the Indian allottees under the Chippewa Treaty of 1854 are vested with sufficient title in their allottments to authoize the sale by them of their standing timber, without the approval of the President.

In that case the title was held by the United States in trust for the allottees and their heirs.

In this case the United States has parted with legal title by a patent in the usual form, except that it contains a restriction, that the grantee shall not sell, lease or in any manner alienate the tract of land without the consent of the President.

The rule is well established in this court that such a patent conveys the title in fee simple to the grantee.

Libby v. Clark, 118 U. S. 250.
Schrimpscher v. Stockton, 183 U. S. 290.
Lykins v. McGrath, 184 U. S. 169.
United States v. Paine Lumber Co., supra.

In Schrimpscher v. Stockton, supra, Mr. Justice Brown, speaking for the court says :

"Here the United States had issued a patent to Rodgers "and to his heirs and assigns forever," subject to a condition, not that the title should ever revert to the United States, but that he should not alienate the lands without the consent of the Secretary of the Interior. The government thus passed all its title to the land in fee simple, and a violation of the condition of the patent would not rebound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

It is suggested that the case of United States v. Paine Lumber Co. supra, simply holds that the allottee has the right to cut the timber himself and sell the logs, that standing timber is a part of the realty and cannot be sold by the allottee without the consent of the President.

The restriction in the patent is simply upon the alienation of the 'tract of land.' By the terms of the treaty the land is assigned to the allottee for his separate use. As suggested in the case of United States v. Paine Lumber Co. it is difficult to understand how the allottee can use timber land if he cannot dispose of the timber.

Again what the allottee can himself do, he can also do by an agent. If he has the right to cut the timber himself he can certainly authorize another to cut it for him.

While it is true that under the statute of frauds the sale of standing timber must be in writing, it is equally true that a parol license is good until revoked, and one cutting under such license is not a trespasser, and gets good title to all timber cut and removed before the license is revoked.

Keystone Lumber Co. v. Kolman, 94 Wis. 465.
Giles v. Simonds (Mass.) 77 Am. Dec. 373 and note.

3.

The sale of the standing timber in this case was consented to by the President.

"The land is not the land of the United States, and the timber when cut did not become the property of the United States." United States v. Paine Lumber Company, supra. Certainly the proceeds of the sale of the timber did not become the property of the United States.

When consent to alienation is given, the President's authority over the matter is ended. Permission once given cannot be revoked. Doe v. Beardsley, 2 McLean 412. Limitations and restrictions on the use of property are not favored, and although they will be enforced when the intent is clear, ordinarily all doubts will be resolved against them. Wakefield v. Van Tassell, 95 Am. St. Rep. 267 Note A, page 214. The consent of the President is no formal proceeding it is a mere matter of permission.

In Lomax v. Pickering, 173 U. S. 26, the court said:

"The approval of the President was no proper part of

the deed. How that permission should be obtained or expressed is left undetermined by the proviso. We see no reason why it might not have been a memorandum at the foot of the petition for approval, or even a letter to that effect. The essential fact was that permission should be obtained and expressed in some form, of which, in all probability, a record was kept in the Department."

Under this restriction upon alienation as construed by it under the treaty, the Interior Department has assumed the widest authority over the Indian allottees, even the most 'liberal constructionist' is left far behind. A strong illustration of this is found in the case of the Red Cliff Indian Reservation adjoining the reservation on which the allotment in question is situated.

On the Red Cliff reservation all the lands were allotted and patented to the individual Indians on or before May 8th, 1897 and all the Indians on that reservation became citizens prior to that date.

Based upon the power supposed to be concealed in the patent construed in the light of the treaty, the Indian Department has kept governmental control of these Indian citizens the same as if they were blanket Indians of the Far West.

There are employed and sustained by the United States, a physician who looks after the sick on the reservation, an Indian farmer whose duties are to look after the Indians and attend to their money matters, to look after the timber on the allotted lands, see that it is properly cut and scaled and accounted for by the contractor, and generally to have immedi-

ate charge of the Indians on the said Red Cliff reservation and their property, also a teacher and housekeeper employed in conducting a day school for the education and instruction in the common branches and domestic economy of the Indian children, also a policeman, whose duties under the direction of the Indian farmer are to preserve order on the reservation.

And still the wonder grows that one small proviso can contain it all.

A conflict of jurisdiction has already arisen between the Indian policeman and the town constable, and the local state court has mulcted one poor Indian policeman in substantial damages for false imprisonment for enforcing order upon the so called reservation.

This court has repeatedly held that where the United States conveyed property to an Indian absolutely, that is without any condition or restriction on its alienation, he could dispose of the same at his pleasure and give good title to his grantee.

United States v. Ritchie, 17 How. 525.
Mann v. Wilson, 23 How. 457.
Crews v. Burchman, 1 Black 352.
Wilson v. Wall, 6 Wall. 83.
Pennock v. Commrs, 103 U. S. 44.
Elwood v. Flannigan, 104 U. S. 563.
Jones v. Meehan, 175 U. S. 1.

It should be kept in mind, that the patent in this case is not one of the so called *trust* patents, provided for in the Act of Congress of Feb. 8th, 1887 commonly known as the 'Dawes' Act.'

In that case the United States retains the legal title, and is the trustee with the rights of such trustee to the trust property in whatever form it may be found.

Here the patent conveys to the Indian the absolute title in fee subject only to the restriction upon alienation.

It is very much exaggerating this restriction upon alienation to read into it the right of the government to control the grantee in the use of such allotment, or the timber standing thereon, or the money derived from the sale of the land, the standing timber or the crops.

This would seem to be a self enforcing condition like the statute of Wisconsin which provides that no mortgage or other alienation by a married man of his homestead, exempt by law from execution, or any interest therein, legal or equitable, present or future, by deed or otherwise, without his wife's consent, evidenced by her act of joining in the deed, mortgage or other conveyance, shall be valid or of any effect whatever." R. S. of Wis. Sec. 2203 as amended by Chap. 45 Laws of Wis. for 1905.

Of like nature is the provision of the Statutes of the United States that a governmental homestead is not liable to sale on execution for debts contracted prior to the issue of the patent.

The only persons who can take advantage of these laws, are those for whose benefit they were passed or their privies.

The contention that the restraint on alienation attaches to the property no matter what form it may take, is without foundation in law or in fact.

The restriction does not reach the timber. One person may own the 'Tract of land', another the standing timber. It would be precisely correct to say that A owned the tract of land and B the timber standing upon it, C having sold the standing timber to B and the tract of land to A.

The allottee is entitled to the separate use of the allotment, and it is difficult to understand how land covered with heavy pine timber can be used except by the cutting and sale of the timber.

It is urged in support of this contention that the law of trusts applies and that the purpose which the government had in mind at the time this restriction was adopted, was to authorize departmental control of the timber and its proceeds.

We fail to find any element of trust retained by these patents. This court in the cases cited, seems to have disposed of this claim, by holding that when the conveyance was approved by the President "it was a determination *that the purposes for which the restriction was imposed had been fully satisfied.*"

The purpose which the government had in mine when the restriction was designed, related to Indians not citizens, and who were still the wards of the government. This relation has been terminated by the Dawes' Act, these allottees are now full fledged citizens of the United States and of the state in which they reside.

This very treaty provides that the patent is to be issued only in case the President finds that the allottees have "become capable of transacting their own affairs." The Presi-

dent by issuing the patent has stamped his approval upon the citizenship conferred upon the allottee.

4.

An examination of the records of the Indian office will show that the Interior Department has based its right to control the timber and its proceeds upon the relation of guardian and ward claimed to exist between the government and the Indian, and the necessity of superintending his weakness and protecting him from imposition.

This idea is expressed by a departmental letter written by acting Commissioner Thos. P. Smith and approved by Secretary Bliss as early as April 19th, 1897 in which it is said:

"The United States has no interest whatever in the lands nor in the timber *except as the guardian of the Indians*, and therefore, the Act of Feb. 16th, 1889 (25 Stats. 673, which authorizes the President to permit Indians residing on reservations or allotments *the fee to which* is in the United States (to dispose of dead timber) would not apply to these allotments."

"Regarding the suggestion 'whether it would not be better to require the purchase money to be paid into the Treasury and then paid out to the Indians to whom it belongs respectively,' I have the honor to say that inasmuch as *these moneys when received will belong to the individual allottees and can in no way become the property of the United States*, I doubt whether it would be expedient or proper to turn them into the Treasury."

And these moneys always have been and now are held by the local Indian Agent or deposited in some local bank subject to the check of the Indian countersigned by such agent.

In case of loss through the failure or dishonesty of the agent or bank, it will not be claimed, we apprehend, that the United States would be responsible to the allottee for such loss.

As said in the case of United States vs. Paine Lumber Co. supra, upon this claim of governmental superintendence of the Indian allottee, "The argument proves too much." In re Heff 197 U. S. 488 it is held that such allottee ceases to be a ward of the government and is released from Federal control.

Whatever control there is must be found in the language of the restriction itself.

The case of United States vs. Rickert 188 U. S. 432 has been urged in support of this claim of guardianship and trust relation.

As stated before that case is based upon the ground that under the particular form of patent issued to the allottee in that case, the legal title remained in the United States which was trustee with all the rights and powers of a trustee. Such is not the case here.

The case of Tomkins vs. Campbell, 129 U. S. 93 is relied upon by counsel for defendant as supporting his contention.

With all due deference to that learned court we believe

its decision to be out of harmony with the decisions of the Supreme Court of the United States.

Winslow, J. delivering the opinion of the court says :

"There is clearly no reason why the Indian should be prevented from selling or alienating his land, and should be given free disposal of the moneys arising from the sale of the timber thereon, which doubtless constituted the principal part of its value. On the contrary, there is every reason why there should be substantially the same restrictions upon the disposal of his money as upon the disposal of his land."

Granting that the *reasons* for restricting the sale of the land apply with equal force to sale of the timber and the disposition of the proceeds, this is not the question. It is not whether the same reasons should lead the United States to keep control of the proceeds, but whether it has done so. We contend, as held by this court in United States vs. Paine Lumber Co. that the condition in restraint of the alienation of the tract of land, does not reach the timber or give the President control of the proceeds.

We apprehend that a hesitation to interfer with the United States government in its control of the Indians, accounts largely for this decision of the Wisconsin court.

5

It was also urged by counsel for defendant in the court below, that under the terms of the contract itself, the local Indian Agent is made trustee of the proceeds, with the right

to control such moneys, and pay them out as he shall in his discretion deem best for the allottees.

In the first place the plaintiff is a minor, and no guardian had been appointed or acted on his behalf in the making of the contract in question. While the present guardian may waive the tort and sue in assumpsit on an implied contract to pay for the timber cut and removed, and against the Indian Agent on the case as for money had and received, it does not bind such guardian to give up the control of the funds of his ward and allow such agent to usurp the authority and rights of such guardian.

The plaintiff being a minor, the alleged contract between him and Justus S. Stearns is voidable and the plaintiff might recover by an action in trespass or conversion.

Tucker v. Moreland, 10 Pet. 58.
MacGreal v. Taylor, 167 U. S. 700.

He may waive the tort and sue in assumpsit.

15 Am, Eng. Encyc. of Law 1112 (2),
Keener Quasi Contracts, 159.

May vs. LeClaire, 11 Wall. 217.

Where the money the proceeds of the sale of the converted property belonging to plaintiff has gone into the hands of a third party with notice, the plaintiff may waive the tort and recover the proceeds of the sale from such third party.

Keener Quasi Contract, p. 170 et seq.
Thatcher v. Pray, 113 Mass. 291,
Bayne v. United States, 93 U. S. 642,
U nited States vs. State Bank, 96 U. S. 30."

The contract provides "that the money shall be paid to the United States Indian Agent for the La Pointe Agency, in trust for the said party of the first part (allottee)."

Does this contract creat a truste in the technical sense of the term?

In the general and popular use of the word it covers many things besides the legel and technical term trust. Money paid to an agent or other person for the use of another is in trust, but technically a trust is only created when the legal title is in the trustee, and the equitable title in the beneficiary. Davies vs. Davies, 109 Wis. 129.

Every trustee is an agent but every agent is not a trustee.

In the case at bar, it would seem that Campell was simply an agent to collect the money, deposit it in the bank, and countersign the checks.

In the contract in question in this case, no other duty or discretion is vested in the agent.

The only duty required of the Indian Agent after the money is deposited in the National Bank is to countersign the check.

The Indian being a citizen of the United States is competent to take hold and convey real and other property, the same as any other citizen of the Republic. United States vs. Ritchie, 58 U. S. 525.

It would not be claimed in case of a white citizen, that if such a provision as the one herein, viz: That the money should be deposited by Campbell in some National Bank sub-

ject to the check of the White citizen, countersigned by Campbell, he could refuse to countersign for the reason that he was of the opinion that the white citizen was not competent to manage his own affairs. The State has provided a way to appoint guardians for the estates of spendthrifts, and neither the Indian Agent nor the United States itself, can take the right away from the State or interfer with it.

In Hitchcock vs. United States, 22 App. D. C. 275 it was held mandamus will not lie to compel the Secretary of the Interior and Commissioner of Indian Affairs to direct an Indian Agent, a subordinate official, to perform a mere ministerial duty, such af countersigning a check. If the duty be a mere ministerial one, no order of the Secretary or Commissioner could be a justification for refusal on the part of the subordinate to perform it.

It is true the Supreme Court of the State of Wisconsin in the case before cited further says:

"In view of these considerations, what is the natural meaning of the provisions of the contract, that the money for the timber is to be paid to the Indian Agent in trust for the Indian, and that it is to be deposited in bank by him subject to the check of the Indian countersigned by the agent? To our minds these provisions cannot be construed as meaning that the government intended to abolish the safeguards which it erected to guard against the Indian's improvidence, but rather that it intended to place the proceeds of the land practically in the same position as the land itself, namely, subject to disposition only by the Indian when such disposition is approved by the government acting through its Indian Agent, instead of through the President."

This may be the true meaning of the contract, but we contend that the Indian Department had no authority to enter into or become a party to such a contract.

That the Indian allottee has the right to sell his timber without the consent of the President, and that if such consent were necessary, when given the control of the President ceases.

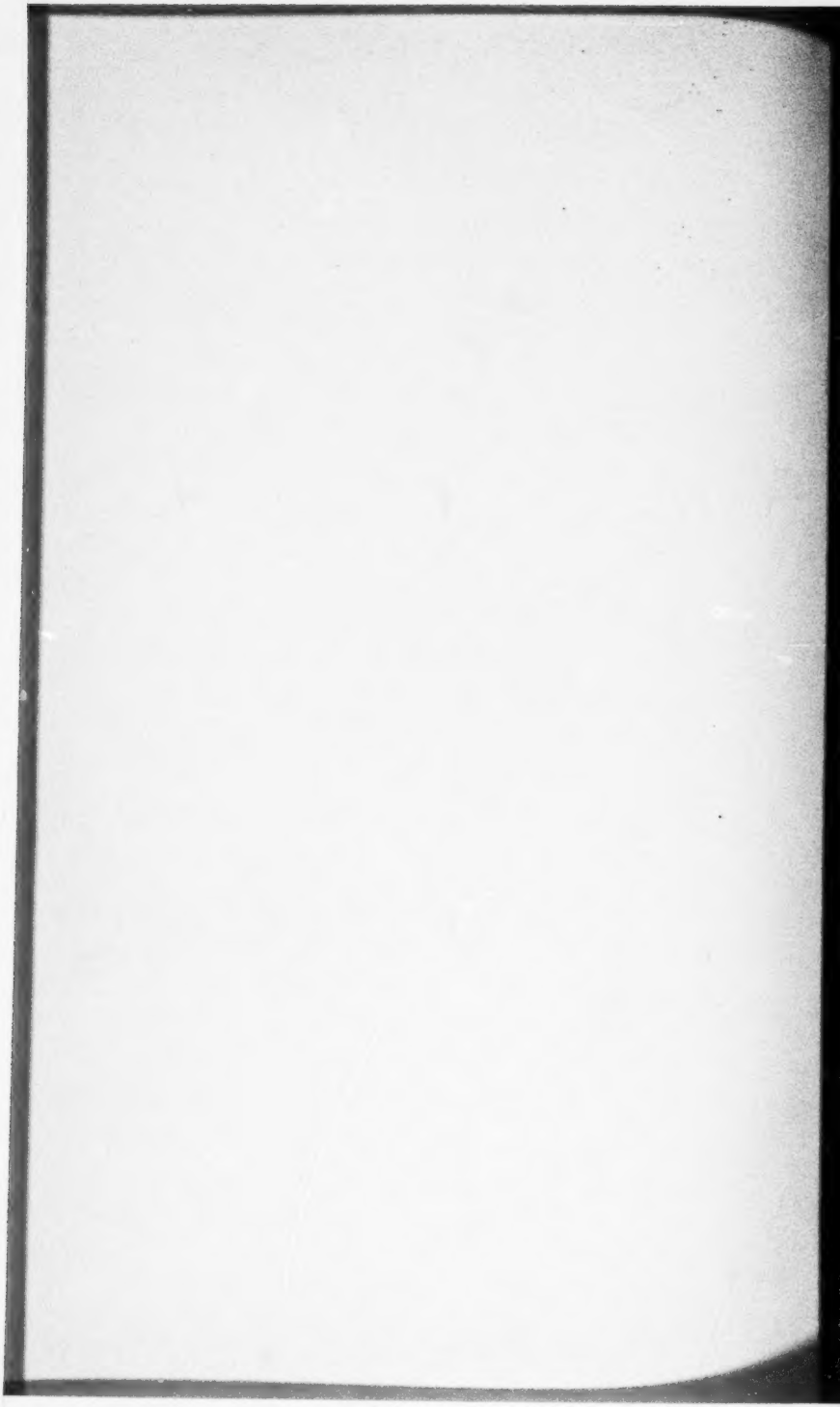
We fail to understand how one can read into this simple proviso so wide a control for the Interior Department. The power of consent is lodged in the President not in the Department.

If the door of consent of the President opens for the entrance of governmental control of the land, the timber, and the proceeds of the sale of both or either, it must be based on the relation of guardian and ward and as suggested in United States vs. Paine Lumber Co. what would be the limits of such control.

Having given the Indian allottee the privileges of citizenship he must assume its burdens and responsibilities, and we doubt not, the sooner this is done the better for all concerned. The present system of citizenship with a string to it, is demoralizing to the Indian citizen, who resents class legislation fully as much as his white brother.

The plaintiff in error, we respectfully submit, should have judgment as prayed for in his complaint.

W. M. TOMKINS,
Counsel for Plaintiff in Error.



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1907

No. 132

ANTOINE G. STARR, AN INFANT, BY A. PEARCE TOMKINS, HIS GUARDIAN, PLAINTIFF IN ERROR,

vs.

SAMUEL W. CAMPBELL, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

Since the original brief in this cause was prepared and filed, this court has decided the case of Wm. Couture vs. United States No. 42, October, 1907 term, Nov. 11th, 1907.

Local counsel for the defendant herein, claim that the case of Couture vs. United States supra is conclusive in this, and that this court in citing in that decision the case of United States vs. Rickert, 188 U. S., 432, and McKay vs. Kalyton, 204 U. S., 458, has in effect held that by the condition against alienation contained in the patents issued under the treaty of Sept. 30th, 1854, the United States retains the same title and control over the lands patented as under the declaration of trust "improperly called a patent" issued pursuant to the Act of Congress of Feb. 8th, 1887, (24 Stats. at Large, 388, 389, 390.) It may be well here to call the attention of this court to the plain distinction it has drawn between these two classes of instruments.

In United States vs. Rickert and McKay vs. Klayton the decisions are based squarely upon the ground that the United States was the legal owner of the land and a trustee of the Indian.

Both cases cite the language ot the Attorney General "that the lands covered by the act are held by the United States for the period of twenty-five years in trust for the Indians, such trust being an agency for the exercise of a Federal power."

In both cases this court says, "the United States retained the legal title."

In United States vs. Rickert it is said "The patents here referred to (although that word has various meanings) were, as the statute plainly imports, nothing more than instruments or memoranda in writing, designed to show that for a period of twenty-five years the United States would hold

the land allotted, in trust for the sole use and benefit of the allottee."

On the other hand, commencing with the decision in Libby vs. Clark, 118 U. S. 250, it has been uniformly held by this court that "An estate in fee simple is where a man has an estate in lands or tenements, to him and his heirs forever", and that a limitation of the power of sale, is not inconsistent with a fee simple estate.

Schreimpscher vs. Stockton, 183 U. S. 290.
Lykins vs. McGrath, 184 U. S. 169.
United States vs. Paine Lumber Co., 206 U. S. 467.

In Schrimpscher vs. Stockton it is held, "The government thus passed all its title to the land in fee simple, and a violation of the conditions of the patent would not redound to the benefit of the United States, or enable it to repossess the lands, but was simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

In United States vs. Paine Lumber Company it is said, "The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple."

Under the so-called trust patent the United States being the owner of the legal title in case of a cutting and taking of the timber without its consent, might maintain trespass or trover, or enjoin the waste.

Johnson vs. McIntosh, 8 Wheat. 574.

But under a patent containing a condition against alienation without the consent of the President, a cutting or removal of the timber would give the United States no right of action.

United States vs. Loughrey, 172 U. S. 206.
United States vs. Paine Lumber Co. supra.

United States vs. Jos. Auger et al 153 Fed. 671 in this last case which arose out of alleged trespass upon allotments on the Bad River Reservation, Sanborn D. J. says:

"The sole right of action is in the Indian allottees."

"The restraint upon the alienation of the tract of land does not extend to a restraint upon the sale of the timber. The land is not the land of the United States, and the timber when cut does not become the property of the United States, and certainly the money derived from the sale of such timber does not become the money of the United States.

United States vs. Paine Lumber Co. supra.

Under the trust patent the title to the land, the timber and the money is in the United States. Under a patent in fee with a simple restraint on alienation the title to the land, timber and money is in the Indian grantee.

Congress recognized this to be the case by providing by Act of Congress of Feb. 16, 1889, (25 Stats. 673) which authorizes the President to permit the Indians residing on allotments the fee to which is in the United States to cut dead and down timber.

It will not be contended we presume that the title to the dead and down timber upon the lands covered by these conditional patents is not in the Indian grantee. If so he can

certainly use and dispose of the same without even the consent of the President.

If the consent of the President were necessary to the validity of a sale, when that consent is given his authority over the matter is ended.

Doe vs. Beardsely, 2 McLean 412.

Such consent is a determination by him that the purposes for which the restriction was imposed has been fully satisfied.

Lykins vs. McGrath supra.

Bearing upon the rule that the consent exhausts the power of the President in the premises we cite Pickering vs. Lomax, 145 U. S. 310 and Lomax vs. Pickering, 173 U. S. 26.

If this were an action in trespass, we apprehend it would be admitted that the guardian would be the proper party to bring an action, the title to the timber being in his ward.

In such case it would seem clear that the guardian and not the Indian agent would be entitled to the control of the money recovered.

In case of an adult Indian who should recover for trespass upon his land under this form of patent, it would not be contended that he must turn over the money recovered to the Indian Agent.

This action is in effect an action to recover for money paid to the agent on a trespass. The so called contract was signed by the minor plaintiff. He by his guardian might recover from the party who cut the timber in trespass and his

guardian control the money so recovered. It will not be claimed we presume that the form of action would defeat the right of the guardian to the money.

It is conceded by the department that the money belongs to the Indian. By what right does the Indian Agent claim the right to retain it? Is it as trustee or legal owner?

The money is in the bank in tha name of the Indian who is the legal owner. It would seem to be a great exaggeration of the condition against the alienation of the tract of land contained in the patent, to say that this gave the United States the control of money derived from a sale of the timber cut from such tract. As well might it be claimed that the United States should collect and control the money derived from a sale of the crops raised on such tract of land.

As was said in United States vs. Paine Lumber Co. supra the treaty contemplated that the Indian would settle upon and improve the allotment, and that to do this the timber must be cut for clearing the land.

It would seem that a fair construction of the treaty and Acts of Congress amendatory thereof shows that the allotments were made to the Indians for the purposes of a home and for cultivation, and for their separate use and benefit, and that the condition against alienation of the 'tract of land' was "simply intended to protect the grantee himself against his own improvident acts, and to declare that the title should remain in him, notwithstanding any alienation that he might make."

Schrimpscher vs. Stockton, supra.

In re Heff 197 U. S. 488, it is announced that the Indian allottee is a full citizen and no longer a ward of the government as to his political status and rights.

In the same case the rule is re-asserted that there can be no divided authority over the property of the Indian.

That is the Indian citizen stands upon the same footing as to his personal and property rights as a white citizen, and that a condition in the title to property of the former has the same force and no more as such condition would have as to the title of the latter.

On the argument in the court below great stress was laid upon the "unwise policy" of paying the Indians their money as fast as it became due and they demanded it.

The present policy is as demoralizing as any that can be imagined. The money is doled out at $10.00 per head, and the Indians, like ordinary white men would do under the same circumstances, try to eke out a living on this amount, and spend most of their time in devising ways and means to get the rest of their money.

From 1881 when the first saw mill was built near the reservation for the purpose of buying and manufacturing this timber until about 1899, the Indians were practically paid their timber on demand, and those allottees started out for themselves and have not become a charge upon the public.

When the writer of this brief came to Ashland, adjoining the reservation the grandfathers of the present young men of that locality, were many of them in business and generally getting along well, no paupers among them, and apparently

much better able to manage their own affairs than are their grandsons.

It is hard for the present allottees whose timber is now being cut to understand why for fifteen years, at least, the allottees were paid in full as demanded while, now they must depend to a great extent upon the apparent whim of the Indian agent as to how much they shall receive.

It would be much better for the Indian to get his money, and such as are not capable of keeping it, spend it and get to work, for as the agent says in his report for 1906, these spendthrifts will not work at farming or improve their allotments so long as money is coming from their timber.

The Indian citizen rebels against the idea of being virtually the ward of the local Indian agent and being treated by him as a child.

The President by issuing the patent has found that the grantee has "become capable of transacting his own affairs." The United States by act of Congress has declared him a citizen with all the rights, privileges and responsibilities of such citizenship, thus declaring him capable of managing not only his own affairs but also those of his white fellow citizens, for in this very instance a large majority of the electors of the town are Indian allottees who decide who shall be the officers and for what amount and purposes taxes shall be levied in the town.

Yet the agent each month tells them they are not capable of managing more than $10.00 per month of the money received from a sale of their own timber.

W. M. TOMKINS,

Counsel for Plaintiff in Error.

[redacted]

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

ANTOINE G. STARR, AN INFANT, BY HIS guardian, A. Pearce Tompkins, plaintiff in error,
v.
SAMUEL W. CAMPBELL, DEFENDANT IN error.
} No. 132.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

BRIEF FOR THE UNITED STATES.

STATEMENT.

By article 2 of the treaty of September 30, 1854 (10 Stat., 1109), the United States agreed "to set apart and withhold from sale for the use of the Chippewas of Lake Superior," including the La Pointe Band, certain described "tracts of land."

Article 3 of that treaty provided:

> ART. 3. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed,

> and may assign to each head of a family or single person over twenty-one years of age eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, *with such restrictions of the power of alienation as he may see fit to impose.* And he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. * * *

The act of February 11, 1901 (31 Stat., 766), entitled "An act providing for allotments of lands in severalty to the Indians of the La Pointe or Bad River Reservation in the State of Wisconsin," provided:

> That with the consent of the Chippewa Indians of Lake Superior, located on the Bad River Reservation, in the State of Wisconsin, to be obtained in such manner as the Secretary of the Interior may direct, the President may allot to each Indian now living and residing on said reservation and entitled to so reside, and who has not heretofore received an allotment, not exceeding eighty acres of land, such allotments to be subject in all respects, *except as to the age and condition of the allottee,* to the provisions of the third article of the treaty with the Chippewas of Lake Superior and the Mississippi concluded September thirtieth, eighteen hundred and fifty-four.

The plaintiff in error, a minor Chippewa, received an allotment and patent therefor pursuant to this act. His patent, which was dated June 29, 1905, provided (Rec., 6):

> Whereas, There has been deposited in the General Land Office of the United States an order bearing date January 6, 1902, from the Secretary of the Interior, accompanied by a schedule with return dated September 27, 1901, from the office of Indian Affairs, containing a list of selections of land for certain Indians of the Bad River Reservation, as contemplated by the treaty concluded September 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi whereby it appears that on the first day of October, 1901, the President, in accordance with the provisions of the third article of said treaty, approved the selection of Antoine G. Starr, being the west half of the southwest quarter of section four (4) township forty-six (46), north of range three (3) west, according to the official plat of the survey of said lands returned to the General Land Office by the Surveyor-General.
>
> Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the said treaty, the order and return, with schedule aforesaid, have given and granted and by these presents, do give and grant, unto the said Antoine G. Starr, and to his heirs, the said tract above described; *but with the stipulation that said Antoine G. Starr, and his heirs shall not sell, lease, or in any manner alienate said tract without the con-*

sent of the President of the United States; to have and to hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature thereunto belonging, unto the said Antoine G. Starr and to his heirs forever, *Provided, as aforesaid, that Antoine G. Starr and his heirs shall not sell, lease, or in any manner alienate said tract without the consent of the President of the United States of America.*

January 8, 1902 (prior to the issuance of the patent), a contract for the sale of the standing timber upon his allotment was made by Antoine G. Starr with one Justus S. Stearns. (Rec. 7.)

By the terms of said contract the purchase price was to be paid to the Indian agent of the La Pointe Agency in trust for Starr. (Rec. 7.) It was further provided that the contract should be void unless approved by the Commissioner of Indian Affairs. (Rec. 8.)

The contract was subsequently modified in certain respects, and as modified was approved by the Acting Commissioner of Indian Affairs in the following manner (Rec. 8–9) :

> DEPARTMENT OF THE INTERIOR,
> OFFICE OF INDIAN AFFAIRS,
> *May 23, 1903.*
>
> The within contract is hereby approved subject to the regulations approved by the President, December 29, 1902, as herein modified.
>
> M. C. TONER,
> *Acting Commissioner.*

The rules and regulations of the President, approved December 6, 1893, relating to the sale of timber upon the reservation, provided (Rec. 10):

> 7. After deducting one-half of the cost of the scaling and other necessary expenses chargeable against the same the proceeds of timber sold from the unallotted portions of the reservation shall be paid to the Indian agent, to be expended for the relief and benefit of the Indians of the reservation under the direction of the Commissioner of Indian Affairs, and the proceeds of timber taken from the allotted lands of the reservation, shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the allotment, countersigned by the Indian agent of the La Pointe Agency, unless otherwise stipulated in contracts with particular Indians.

This provision was amended by the President in December, 1902, by adding the following paragraph (Rec. 4):

> If the Indian agent shall in any case be of opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit.

The petition states that the land allotted to the plaintiff in error, "exclusive of the merchantable timber standing thereon, was then and now is of the value of $1,000 and no more."

The petition further states (Rec. 4):

> 6. That between the 27th day of January, 1902, and the 1st day of October, 1905, and prior to the commencement of this action, the said Justus S. Stearns named in said contract entered upon said land and cut and removed therefrom a large amount of standing timber of the value of at least fifteen thousand ($15,000) dollars, which amount was prior to the commencement of this action paid to the said defendant, S. W. Campbell, for the use and benefit of this plaintiff, that of said amount said Campbell has paid to said plaintiff the sum of three thousand one hundred ($3,100) dollars and no more, and there is still in the said Campbell's possession the sum of eleven thousand nine hundred ($11,900) dollars so received by him for this plaintiff.

This suit was instituted for the purpose of compelling the defendant to turn over the balance of the purchase money to the plaintiff or his guardian, the latter having been appointed by the county judge of Ashland County, Wis.

In sustaining the demurrer interposed by Campbell, the Indian agent, to the complaint, Judge Sanborn (after referring to article 3 of the treaty of September 30, 1854) said (Rec. 12):

> By virtue of this provision the President has made rules and regulations concerning the alienation or sale of the standing timber upon the tracts mentioned in the complaint, and from such sale the moneys claimed by the plaintiff were derived. In view of the power

given to the President by the treaty and the execution of such power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Interior Department and is held in trust by the United States for the plaintiff's benefit, and that the demurrer interposed to the complaint should be sustained.

ARGUMENT.

I.

The citizenship of plaintiff in error is immaterial.

This suit seems to have been originally instituted upon the theory that the guardianship exercised by the Government over the property of plaintiff in error was inconsistent with the citizenship conferred upon him by section 6 of the general allotment act of February 8, 1887 (24 Stat., 388).

That conferring citizenship upon an Indian does not necessarily free him from the guardianship of the United States in respect to property granted him by the General Government has been recognized both by this and other Federal courts.

United States v. *Rickert*, 188 U. S., 432.
Matter of Heff, 197 U. S., 488, 508–9.
Cherokee Nation v. *Hitchcock*, 187 U. S., 294, 307–8.
United States v. *Thurston Co.*, 143 Fed., 287, Circuit Court of Appeals, Eighth Circuit.
National Bank of Commerce v. *Anderson*, 147 Fed., 87, Circuit Court of Appeals, Ninth Circuit.

The last two cases upheld the validity of regulations of the Secretary of the Interior providing for

the deposit and payment to the Indians entitled thereto, in monthly installments of ten dollars each, of the moneys derived from the sale of inherited Indian allotments, the act of May 27, 1902, authorizing the sale of such lands subject to the approval of the Secretary of the Interior.

Section 6 of the general allotment act expressly provides that the privilege of citizenship is conferred "without in any manner impairing *or otherwise affecting* the right of any such Indian to tribal or other property."

In *Hitchcock* v. *U. S. ex rel. Bigboy* (22 App. D. C. 275), Bigboy, also a Chippewa Indian holding an allotment upon the Bad River Reservation, sought to compel the Secretary of the Interior, by mandamus proceedings, to turn over the balance of the purchase price of timber sold from his allotment under a contract similar to that made by plaintiff in error. Reliance was had in that case upon the fact of Bigboy's citizenship, but the Court of Appeals said (p. 284):

> We are unable to see what part the fact of the citizenship of the relator performs in the present case. He might well be a citizen, with all the rights and privileges of citizens, and yet be disqualified from the exercise of absolute ownership over certain specified property. If it be conceded that among the rights of citizenship is that of freely acquiring, holding, and disposing of property, yet it does not follow that the grantor of property may not place re-

strictions upon its use by the grantee or person for whose benefit it is granted.

In the Heff case this court said (197 U. S., 508–9):

> But it is said that the Government has provided that the Indians' title shall not be alienated or encumbered for twenty-five years and has also stipulated that the grant of citizenship shall not deprive the Indian of his interest in tribal or other property, but these are mere property rights and do not affect the civil or political status of the allottees. In *United States* v. *Rickert* (188 U. S., 432), we sustained the right of the Government to protect the lands thus allotted and patented from any encumbrance of State taxation. Undoubtedly an allottee can enforce his right to an interest in the tribal or other property (for that right is expressly granted) *and equally clear is it that Congress may enforce and protect any condition which it attaches to any of its grants.* This it may do by appropriate proceedings in either a National or a State court. But the fact that property is held subject to a condition against alienation does not affect the civil or political status of the holder of the title. Many a tract of land is conveyed with conditions subsequent. A minor may not alienate his lands, and the proper tribunal may at the instance of the rightful party enforce all restraints upon alienation.

We think it clear, under the decisions cited, that if the restriction upon the alienation of the land author-

ized by the treaty of September 20, 1854, and contained in the patent to plaintiff in error, embraces the sale of the timber on his allotment, the power of the President to make the regulations in question is indisputable.

II.

The restriction on alienation embraces the sale of the standing timber.

Prior to the decision of this court in the Paine Lumber Company case (206 U. S., 467), no one seems ever to have thought of questioning that a restriction upon the alienation of land allotted to an Indian included the sale of the standing timber. We will discuss and distinguish that case later.

In *Hitchcock* v. *U. S. ex rel. Bigboy, supra,* which, as stated, was a case similar to this, the Court of Appeals said (22 App. D. C., 286–7):

> It is not controverted that under the treaty of 1854 the President had power to place restrictions upon the alienation of the lands allotted in severalty. He exercised that power by providing that the Indian owners should not sell without his consent. It seems, also, not to be controverted that the restriction extended to the sale of the timber on the land as well as to the land itself. * * *

The lack of controversy on this point was doubtless due to the elementary principle of the common law that standing timber is a part of the realty.

This principle was recognized by the court in *United States* v. *Cook* (19 Wall., 591, 593), where it was said:

> The timber while standing is a part of the realty, and it can only be sold as the land could be. The land can not be sold by the Indians, and consequently the timber, until rightfully severed, can not be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose. When rightfully severed it is no longer a part of the land, and there is no restriction upon its sale.

Blackstone says (Bk. 2, p. 18):

> Corporeal hereditaments consist wholly substantial and permanent objects; all of which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke (e), comprehendeth, in its legal signification any ground, soil, or earth whatsoever; as arable, meadows, pastures, *woods*, moors, waters, marshes, furzes, and heath. * * *
>
> Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law; upwards, therefore no man may erect any building, or the like, to overhang another's land: and downwards, whatever is in a direct line, between the surface of any land and the center of the earth, belongs to the owner of the surface (4); as is every day's experience in

> the mining co[illegible]ries. So that the word "land" include[illegible] not only the face of the earth, but everything under it, or over it. And therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his *woods*, his waters, and his houses, as well as his fields and meadows.

Williams on Real Property (pp. 78–9):

> The methods by which a tenant in fee simple can alienate his estate in his lifetime will be reserved for future consideration, as will also the subject of alienation by testament. As a tenant in fee simple may alienate his estate at his pleasure, so he is under no control in his management of the lands, but may open mines, *cut timber*, and commit waste of all kinds, (z) grant leases of any length, and charge the lands with the payment of money to any amount.

Plaintiff in error says (Brief, p. 18):

> The restriction [on alienation] does not reach the timber. One person may own the "Tract of land," another the standing timber. It would be precisely correct to say that A owned the tract of land and B the timber standing upon it, C having sold the standing timber to B and the tract of land to A.

It is difficult to see how plaintiff in error can logically contend that the restriction on the alienation of the tract of land contained in the patent did not cover the standing timber, when his only title to such timber depends upon the conveyance to him of the land.

In other words, plaintiff in error is placed in the position of contending that while the allotment to him of the tract of *land* described in the patent conveyed title to the timber standing thereon as a part of the land, the restriction on the alienation of the land in the same patent did not cover the timber.

The Executive Department of the Government, charged with the administration of these allotment matters, has always construed the restriction on alienation to embrace the timber on such lands.

It is apparent that both in the treaty of September 30, 1854, and in the patents issued thereunder, the term "alienation" is used in its broadest sense. By the treaty, the President is authorized to impose such restrictions on the power of alienation "as he may see fit," and by the patents it is provided the allottee or his heirs "shall not sell, lease *or in any manner alienate* said tract without the consent of the President of the United States."

The act of February 11, 1901, under which plaintiff in error received his allotment, and which authorized allotments to be made to all Indians upon the Bad River reservation, without regard to age and condition—that is, whether married women or children incapable of managing their own affairs—would, is fair to say, never have been passed if it had been supposed that the long-continued practical construction of the provision respecting alienation was likely to be overthrown.

In reporting this bill to the House, and recommending its passage, the Committee on Indian Affairs said (House Report No. 2465, 56th Cong., 2nd sess.):

> The passage of this bill is recommended by the United States Indian agent in charge of the Indians, the Acting Commissioner of Indian Affairs, Mr. Tanner, and the Secretary of the Interior.

The proceedings in the Senate were as follows (33 Cong., Rec. 3966):

> Mr. QUARLES. I ask unanimous consent for the present consideration of Order of Business 890, being Senate bill 3901. It is a measure against which there is no objection, to provide for the allotments of lands in severalty to the Indians in one of the Wisconsin reservations. It has been recommended by the Indian Bureau and unanimously recommended by the Committee on Indian Affairs.
>
> There being no objection, the Senate, as in Committee of the Whole, proceeded to consider the bill (S. 3901) providing for allotments of lands in severalty to the Indians of the La Pointe or Bad River Reservation in the State of Wisconsin.
>
> The bill was reported to the Senate without amendment, ordered to be engrossed for a third reading, read the third time, and passed.

In the House (34 Cong., Rec. 1815):

> Mr. STEWART of Wisconsin. I ask unanimous consent for the present consideration of the bill (S. 3901) providing for allotments of

lands in severalty to the Indians of the La Pointe or Bad River Reservation, in the State of Wisconsin.

The bill was read as follows:

* * * * *

Mr. RICHARDSON of Tennessee. Has this bill been unanimously reported from the Committee on Indian Affairs?

Mr. STEWART of Wisconsin. It has.

Mr. RICHARDSON of Tennessee. Has it been submitted to the Department?

Mr. STEWART of Wisconsin. It has been.

Mr. RICHARDSON of Tennessee. And recommended by the Secretary of the Interior?

Mr. STEWART of Wisconsin. It is a Department measure entirely; the Secretary has asked that it go through. The report of the committee is here.

Mr. RICHARDSON of Tennessee. If the bill has been recommended by the Department and is unanimously reported by the committee——

Mr. STEWART of Wisconsin. It is.

Mr. RICHARDSON of Tennessee. Then I have no objection.

There being no objection the House proceeded to the consideration of the bill; which was ordered to a third reading, read the third time, and passed.

On motion of Mr. Stewart of Wisconsin, a motion to reconsider the vote by which the bill was passed was laid on the table.

The annual report to Congress of the Secretary of the Interior for 1900, included a report from the In-

dian Agent for the La Pointe Agency, in which it was stated (Ann. Rep., Dept. of Interior, 1900, p. 409):

> *Allotments.*—During the past fiscal year 135 patents for Bad River Indians, 152 patents in favor of Lac du Flambeau Indians, and 1 patent in favor of a Red Cliff Indian have been received at this agency, all covering allotments of land taken on the reservation to which the patentee belongs. These patents were for allotments contained on schedules forwarded for Department approval more than two years ago.
>
> No new lists of allotments have been proposed during the past year. A bill looking to the allotting of land to married women and minor children of the Bad River Reservation is before Congress at the present time, and it is expected that favorable action will be taken in the matter, *thus enabling these Indians to acquire much needed land and dispose of the timber thereon to their advantage.*

The conditions which prompted the issuance of the regulations approved December 6, 1893, in regard to the sale of timber upon the Bad River Reservation to Justus S. Stearns, set forth in the Record (p. 9), are stated in the Report of the Commissioner of Indian Affairs for 1894 (pp. 57–59), as follows:

> *Bad River Reservation, Wis.*—Until recently the condition of the Chippewas on the Bad River Reservation was as deplorable as that of the Lac du Flambeau Chippewas prior to

the granting of authority for the sale of their timber to Messrs. Cushway & Co. October 18, 1893, Lieutenant Mercer, acting agent, transmitted to this office a petition numerously signed by the Indians of the Bad River Reservation, praying that a proposition made to them by J. S. Stearns, for the purchase of the timber on their respective allotments, and the dead timber standing or fallen on the unallotted lands of their reservation, be accepted by the Government, the prices offered being considered both by Lieutenant Mercer and the Indians as very advantageous.

* * * * *

Acting Agent Mercer stated that there were undoubtedly 50,000,000 feet of timber on the reservation that had recently been burned, and a great amount of other dead timber, such as windfalls, the greater part of which if left uncut and out of water would not pay the cost of removal; also that the Indians on the reservation were practically without work, and most of them without provisions to carry them through the winter, and that the prices offered by Mr. Stearns were very much higher than those offered by a number of other lumber dealers in the vicinity of the reservation to whom he had applied. This office therefore reported to the Department that if the Department should conclude to make additional allotments to the Indians on the Bad River and Lac du Flambeau reservations, as recommended in office reports of May 25, June 13, and July 5, 1893, the proposal made by Mr. Stearns to purchase the timber of the

Bad River Indians would be prepared for submission to the President.

* * * * *

November 18, 1893, the office submitted a statement relative to Mr. Stearns's proposition, and a draft of rules and regulations to govern the sale of timber in accordance therewith, and recommended that the President be requested to authorize the sale of timber on the allotted and unallotted lands of the reservation by approving said rules and regulations, which were substantially the same as those under which the Lac du Flambeau logging was being done.

The President granted the required authority, and Mr. Stearns filed his bond for $50,000, which was approved by the Department January 12, 1894, and Acting Agent Mercer was directed January 18, 1894, to permit him to begin operations, and to see that the rules and regulations were strictly complied with by all parties concerned in the cutting and manufacture of timber on the Bad River Reservation. He was also notified that the office regarded it important that the Indians should be assisted and advised in the matter of their contracts by some one familiar with the value of timber and with timber operations, and he was therefore directed to thoroughly supervise the making of the contract himself, or to designate one of his employees who was familiar with logging operations and the value of timber, to assist the Indians in making their contracts and to see that the prices agreed upon were reasonable and fair.

> March 9, 1894, the President approved a list of 38 new allotments to the Indians of the Bad River Reservation, and March 22, 1894, the office recommended that the President authorize the sale to Mr. Stearns of the timber on these 38 new allotments under the regulations, and at the prices named in the authority of December 6, 1893. April 4, 1894, the President granted the authority requested, and Mr. Stearns has filed a stipulation executed by himself and the City Trust Safe Deposit and Surety Company of Philadelphia (his surety on his original bond) extending the stipulations of that bond to cover his operations under the new authority.
>
> One hundred and sixty-eight contracts have been entered into between Mr. Stearns and the Indian allottees, and it is understood that he is actively engaged in the erection of his plant for logging and for the manufacture of lumber.
>
> So far as this office has been advised his operations on the Bad River Reservation have been to the entire satisfaction of the agent and for the benefit of the Indians.

In the Report of the Commissioner of Indian Affairs, dated September 14, 1895 (Ann. Rep. Secretary of Interior, 1695, vol. 2, pp. 50–51), referring to the Lac Court d'Oreilles Reservation, Wisconsin, one of those established under the Chippewa treaty of September 20, 1854, the Commissioner said:

> This reservation was at one time considered as embracing one of the most extensively timbered tracts in northern Wisconsin. The timber was not only plentiful but also of the

finest quality. Between the years 1882 and 1889, however, the reservation was practically denuded of its timber, and the money paid therefor to the Indian allottees was squandered in gambling and other extravagances. Over 300,000,000 feet of timber was taken from the reservation during the years named, and, except that four or five of the Indians have built nice houses and are in comparatively comfortable circumstances, the Indians have nothing to show for their days of prosperity.

This fact is due largely to the system under which the timber on the various reservations of the La Pointe Agency was permitted to be sold and the logging operations to be conducted. On each reservation were a number of lumber firms, each firm wanting, of course, to obtain the best timber; and each seems to have gone systematically to work to hoodwink or debauch the Indian allottees in order to secure their good will and timber. In many instances an allottee would make a contract to sell his timber to two or more, even as high as five, different firms, when there would be a long and bitter fight between the lumber men to determine who should have it. Indeed, on the Bad River Reservation at one time the logging camps are said to have resembled the encampment of an army. Armed forces were maintained by the firm in possession of a certain body of timber to prevent encroachments by the forces of other lumber men who claimed a better right thereto. The Indian was mostly

paid for his timber in merchandise (each lumber firm had a store on the reservation), on which the lumberman made a good profit. Some were paid large sums of money, which would be squandered in one night in gambling and drink.

The system now in operation under this agency is different. The office has decided upon the policy of allowing only one logger on each reservation. The lumberman is required to pay for the timber in cash to the agent, and the Indian is permitted to have money to be used only for proper purposes, such as building a house on his allotment or otherwise improving his land to adapt it for agricultural use, and when his check is honored the farmer on the reservation is required to see that he spends the money for the purpose designated. Under this system many of the Indians on the Lac du Flambeau Reservation, where logging has been going on the longest, have built very comfortable houses on their allotments, and all have warm clothing to protect them in the bitter winters of that region and plenty to eat all the year round.

It seems fair to say that, as Congress had been repeatedly advised by the reports of the Interior Department of the conditions as to "logging" upon the Bad River and other reservations in Wisconsin, it is both the legislative and executive construction of the treaty of September 30, 1854, with the Chippewas, that the restriction upon alienation covered the timber upon such lands.

The understanding of Congress that a restriction upon alienation extends to the timber on an Indian allotment appears from various acts authorizing the cutting and sale of such timber by Indians holding timber lands.

The act of February 12, 1901 (31 Stat., 785), provided:

> That the Indians on the Grand Portage Indian Reservation, in the State of Minnesota, shall be, and they are hereby, permitted to cut and dispose of the timber on their several allotments, under such rules and regulations as may be prescribed by the Secretary of the Interior.

The act of April 21, 1904 (33 Stat., 189, 209–210), provided:

> The Chippewa Indians of the State of Minnesota to whom allotments have been or shall hereafter be made, and trust or other patents, containing restrictions upon alienation issued or which shall hereafter be issued therefor, are, with the consent of the Secretary of the Interior and under such rules and regulations as he may prescribe, hereby authorized to dispose of the timber on their respective allotments. Timber on the allotments of minors may likewise be so sold by the father, mother, or Indian agent or other officer in charge, in the order named, and the Secretary of the Interior shall make such regulations for the disposition of the proceeds of said sales as may be necessary to protect the interests of said Indians, including such minors.

The second clause of the provision last quoted is an adoption by Congress of the practice of the President with respect to the Chippewas of Lake Superior.

We do not think the language or doctrine of the Paine Lumber Company case should be extended so as to cover this case. That case may be rested upon the proposition there stated that, as the land was not the property of the United States, the timber when cut did not become the property of the United States; hence the United States could not be allowed to recover over the value of the timber from a bona fide purchaser who had paid the purchase price therefor to the allottee.

Moreover, in the Paine Lumber Company case, as the court observed, the treaty there in question contemplated that the allotments should be made of "arable" land, and as there stated, "arable land is of no use until the timber is cut off." Here, the grant was of timber land.

So, also, in the Paine Lumber Company case, there was a bare restriction on alienation, which it was permissible to interpret according to the character of the land granted and the uses to which it could be put. Here, the President was authorized to impose any restrictions upon the alienation of the land that he might deem proper; he put into the patent the broadest possible restrictions, and the character of the land renders it imperative for the welfare of the allottee that the restrictions should extend to the timber. If they do not they are practically valueless.

If it be held in this case that the restriction upon alienation does not prevent the allottee from selling the timber on his allotment, we will have the case presented of a minor Indian being able to dispose of his allotment to the extent of over fifteen-sixteenths of its value without the consent of the President, as the petition states that the land without the timber is worth only $1,000, while the timber already cut therefrom was sold for $15,000.

We also respectfully submit, in view of what was said in the opinion in the Paine Lumber Company case, that there is a plain distinction between cutting timber for purposes of cultivation and use, and selling it as in this case. The situation thus presented seems to us no more difficult of solution than that which arises where the question is whether waste has been committed by one who is not a tenant in fee.

Williams on Real Property (p. 23):

> Every tenant for life, unless restrained by covenant or agreement, has the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry, and for repairing the house, and the hedges and fences, (1) and also the right to cut underwood and lop pollards in due course. (*m*) But he is not allowed to cut timber or to commit any other kind of *waste;* (*n*) either by voluntary destruction of any part of the premises, which is called *voluntary* waste, or by permitting the buildings to go to ruin, which is called *permissive* waste.

25

In a note to this paragraph it is stated (id., p. 23):

> While the principles of the law of waste are the same in the United States as in England, yet the application of them is accommodated to the peculiar circumstances and condition of land in this country. The change of arable land to meadow, etc., is not therefore waste in ordinary cases, and it has been generally held that a tenant for life of wild land may cut down timber for the purpose of clearing and cultivating a reasonable portion of the land, regard being had to the location and condition of the whole farm, the value of the timber, and the course of good husbandry. (*Wilkinson* v. *Wilkinson*, 59 Wis., 557; *Stout* v. *Dunning*, 72 Ind., 343.) What is waste in such cases is a question for a jury, to be determined by the usage and practice of the country. But such tenant may not cut down all the timber, or so much of it as will permanently damage the inheritance. (*Morehouse* v. *Cotheal*, 2 Zab., 521; *Keeler* v. *Eastman*, 11 Vt., 293; *McCullough* v. *Irvine's Exrs.*, 1 Harris, 438; *Jackson et al.* v. *Brownson*, 7 Johns., 227; *Ward* v. *Sheppard*, 2 Hayw., 283; *Woodward* v. *Gates*, 38 Ga., 212; *Drown* v. *Smith*, 52 Me., 141; *McCay* v. *Wait*, 51 Barb., 141.) He may sell the timber to repay himself the expense of clearing, but if valuable trees be cut for sale, and not for the purpose of cultivating the land, it is waste. (*Davis* v. *Gillian*, 5 Iredell Eq., 308, 311.)

In *United States* v. *Cook*, the court said (19 Wall., 593):

> This right of use and occupancy by the

Indians is unlimited. They may exercise it at their discretion. If the lands in a state of nature are not in a condition for profitable use, they may be made so. If desired for the purposes of agriculture, they may be cleared of their timber to such an extent as may be reasonable under the circumstances. The timber taken off by the Indians in such clearing may be sold by them. But to justify any cutting of the timber, except for use upon the premises, as timber or its product, it must be done in good faith for the improvement of the land. The improvement must be the principal thing, and the cutting of the timber the incident only. Any cutting beyond this would be waste and unauthorized.

III.

Power of the President to control the disposition of the proceeds of timber sold.

Assuming that the sale of the timber would be an alienation of the land within the meaning of the treaty of September 30, 1854, and the patents issued thereunder, and that such timber could not therefore be sold without his consent, it would seem needless to argue that the President, as a condition of his consent, might make any proper regulation with regard to the disposition of the proceeds thereof that the welfare of the allottee may appear to him to require.

In *United States* v. *Thurston Co.*, 143 Fed., 287, in discussing the power of the Secretary of the Interior to control the disposition of moneys derived from

the sale of inherited Indian allotments, by regulations similar to those here in question, which sales could only be made with his approval, the Circuit Court of Appeals for the Eighth Circuit said (p. 291):

> Nor is the complainant without lawful authority to hold these proceeds and to control their disposition in the same way that it held and controlled the lands in trust for the benefit of these Indian heirs. The act of 1902 authorized these heirs to sell and convey their inherited lands only when the proposed sales were approved by the Secretary of the Interior. It thereby vested in the Secretary plenary power to permit or to forbid the sales proposed. The whole is greater than any of its parts, and includes them all, and the authority to allow or to prohibit proposed sales necessarily included the power to consider and determine the terms and conditions on which such sales should be approved. By rules and regulations approved October 4, 1902, and amended September 16, 1904, and May 25, 1905, the Secretary provided that owners of inherited Indian lands might be permitted to sell them on condition that they agreed that the proceeds of such lands should be placed in one or more banks, which should furnish satisfactory bonds to guaranty the safety of the deposits, to the credit of each heir in proper proportion, subject to the checks of such heirs only when approved by the agent or officer in charge for amounts not exceeding $10 to each in any one month, and subject to their checks for larger amounts

> only when approved by the agent specifically authorized by the Commissioner of Indian Affairs. The acts of Congress authorized the Secretary to make these regulations for the purpose of carrying into effect the act of 1902, and, when made, they had the force of statutory enactments. Rev. Stat., secs. 441, 465 (U. S. Comp. St., 1901, pp. 252, 264); *U. S.* v. *Eaton*, 144 U. S., 688; *Wilkins* v. *U. S.*, 96 Fed., 837. The Indians whose rights are under consideration made the sales of their lands subject to the conditions prescribed by these rules. * * *

In *National Bank of Commerce* v. *Anderson*, 147 Fed., 87, the Circuit Court of Appeals for the Ninth Circuit reached a like conclusion in respect to the same matter.

In the present case the timber was sold under a contract entered into by both parties, subject to the regulations of the President in respect to the disposition of the proceeds, and it would seem that Starr was estopped from contesting their validity while seeking the benefit of the contract in all other respects.

While the contract of a minor is voidable, it is well settled that he can not seek to retain the benefit of a contract and at the same time escape its obligations.

We deem it unnecessary to argue the proposition that, if the restriction on alienation covers the sale of the timber, the guardian of Starr appointed under the authority of the State court can not interfere with any regulation in respect thereto which the

President is authorized to make. The Constitution and the laws made in pursuance thereof are supreme, and it is well settled that a regulation of the executive department of the Government authorized by law has all the force of law.

It is respectfully submitted that the judgment of the Circuit Court should be affirmed.

HENRY M. HOYT,
Solicitor General.

O



In the Supreme Court of the United States.

OCTOBER TERM, 1907.

ANTOINE G. STARR, an infant, by A. Pearce TOMKINS, his guardian,
Plaintiff in error,
vs.
SAMUEL W. CAMPBELL,
Defendant in error.
No. 132.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

This court having granted to us, as counsel for the Red Cliff Lumber Company in other pending litigation involving similar questions, permission to submit a brief in this suit as *amici curiae*, we respectfully present the following:

This is an action at law for the recovery of money alleged to have been received by defendant in error, who is the United States Indian Agent for the La Pointe Agency, in Wisconsin, to the use of plaintiff in error who is an Indian. The plaintiff in error, who was the plaintiff below, is an infant, and the action is prosecuted in his behalf by his guardian ad litem (who is as well the general guardian appointed by the County Court of Ashland County, Wisconsin.)

To the complaint the defendant addressed a demurrer on the ground of insufficient facts, and on a hearing,

the demurrer was sustained and judgment entered dismissing the complaint, from which the plaintiff prosecutes this writ for the correction of alleged errors.

Taking the complaint as true, as we must, it states the following,

FACTS.

The plaintiff in error is an Indian, a member of the Bad River Band of the Chippewas of Lake Superior, and has been allotted, by the United States, eighty acres of land in the Bad River or La Pointe Reservation in Wisconsin, for which he received a patent June 9th, 1905, by virtue of Article 3 of the Treaty of September 30th, 1854, between the United States and the Chippewas of Lake Superior and the Mississippi, (Printed record ,page 4) and the Act of Congress of February 11th, 1901, to which a more extended reference is hereinafter made.

The patent granting the allotted lands contains the stipulation that the plaintiff in error "and his heirs shall not sell, lease or in any manner alienate said tract without the consent of the President of the United States," (Printed Record, Page 6.)

That the allotted lands were chiefly valuable for the timber thereon.

By rules and regulations promulgated by the President of the United States December 6th, 1893, (Printed Record Pages 9-10-11) all the Indians of said Reservation receiving allotments and patents therefor were authorized to sell by contracts to be entered into all the timber standing or fallen on their respective allotments, to one Justus S. Stearns at a stipulated price; and it was provided further that the proceeds of such timber, less certain deductions, should be deposited in some national bank subject to withdrawal by check of the Indian allottees, countersigned by the Indian Agent, unless otherwise stipulated in contracts with particular Indians.

A contract was entered into, dated January 8th, 1902, between plaintiff in error and said Stearns, wherein the plaintiff in error sold and said Stearns purchased, and agreed to cut and remove, the timber on said allotment (Printed Record Pages 7-8-9;) and it was expressly provided therein that said Stearns would pay "to the United States Indian Agent for the La Pointe Agency in trust" for the plaintiff in error for all such timber so cut, the agreed contract price per thousand feet. The contract was approved May 23d, 1903, by the Commissioner of Indian Affairs on the condition annexed by him, (Printed Record Pages 8-9) and accepted by said Stearns that the purchaser should so pay "to the United States Indian Agent at the La Pointe Agency in trust for the party of the first part" (Plaintiff in error) for such timber, rates substantially higher than those named in the contract; subject, however, to the amendment of the rule or regulation 7 made by the President, which is as follows:

> "If the Indian Agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit." (Printed Record Page 4, where set out in complaint.)

That said Stearns entered upon said lands and cut and removed therefrom timber of the value of Fifteen Thousand Dollars ($15,000.00,) which sum was paid to defendant in error as the United States Indian Agent of the La Pointe Agency for the use of plaintiff in error in trust as provided. Of this sum plaintiff in error has been paid Thirty One Hundred Dollars ($3,100.00,) and the balance, Eleven Thousand Nine Hundred Dollars ($11,900.00,) the defendant in error as such Indian Agent still holds and refuses, upon demand, to pay to plaintiff in error other than in instalments of Ten Dollars (10.00)

per month as instructed by the Commissioner of Indian Affairs.

That such refusal is based upon the above quoted amendment of rule 7 and appears to be an exercise of the discretion reposed by such amended rule or regulation, in the Indian Agent and Commissioner of Indian Affairs.

That prior to the amendment of Rule 7, it was the established custon and practice of the Indian Agent of said Agency to pay to allottees under such or similar contracts the amounts payable thereunder as fast as demanded by the allottees without interference or control of the Indian Agent or Commissioner of Indian Affairs.

It is also alleged, as a fact, though it partakes more of the nature of argument and is the ultimate point to be determined, that it is not within the scope of the authority of the Commissioner of Indian Affairs to interfere with or control the disposal of the moneys so received and held by the Indian Agent; and that the general guardian of plaintiff in error appointed under the laws of Wisconsin, is the proper person to determine how much shall be paid to and expended for plaintiff in error.

That plaintiff in error has by reason of the refusal of defendant in error to pay said money or countersign a check therefor, been damaged in the sum of Eleven Thousand Nine Hundred Dollars ($11,900.00.)

The plaintiff in error makes the following:

ASSIGNMENT OF ERRORS.

I.

The court erred in sustaining the defendant's demurrer to the plaintiff's complaint herein.

II.

The court erred in entering judgment in favor of the defendant and against the plaintiff.

THE CONTENTIONS OF PLAINTIFF IN ERROR ARE:

I.

That he is an Indian allottee and as such is a citizen of the United States and, perforce, of Wisconsin by virtue of the Act of Congress of February 8th, 1887, (24 Stats. at L. 389.)

II.

That as such citizen plaintiff in error is entitled to "the benefit of" the laws of the State of Wisconsin and of "the rights, privileges and immunities" of citizens of the United States.

III.

That the said Act conferring citizenship upon Indian allottees *ipso facto* emancipated the Indians from Federal control and guardianship theretofore existing, not only as respects the control of the person of the Indians but the control of their property derived from the United States as well.

IV.

That the continued exercise of control of the Federal government, after such enactment, over the property of the plaintiff in error derived from the United States, abridges and violates the "rights, privileges and immunities" guaranteed to him as a citizen of the United States and denies to him the equality of those "rights, privileges and immunities" of citizens and the "benefit" of the laws of Wisconsin.

V.

That one of the rights and privileges of such an infant citizen is to have a properly constituted guardian, who shall be charged with the control of either his person or his property or both, as the circumstances require.

VI.

That he has such guardian of his property, appointed by a court of competent jurisdiction in Wisconsin, but that his rights so derived have been infringed in this, that defendant in error, who has received certain moneys for his use and benefit, refuses to pay the same on demand to his general guardian.

VII.

That his general guardian is alone the proper person to have the custody and control of said funds for plain tiff's benefit.

VIII

That the title of plaintiff in error to his allotment is in fee simple, subject only to the restrictions imposed on alienation without the consent of the President.

IX.

That when the President has consented to the sale of the timber on the allotment of plaintiff in error the authority of the President over the subject matter has ceased; and that the officials of the Department of the Interior have no lawful authority to interfere with the disposal of the proceeds from the sale of said timber.

X.

That the conditions annexed by the President to his consent given to the sale of the timber on the allotment of plaintiff in error, were wholly unauthorized and without force.

ON THE OTHER HAND THE CONTENTIONS OF THE DEFENDANT IN ERROR ARE:

I.

That it was competent for the United States to secure to plaintiff in error the title to the lands in question

out of the public domain, and the proceeds to be derived therefrom, in the manner adopted.

II.

That the Act of Congress of 1887, (24 Stat.at L.389) fixed and determined only the civil and political status of plaintiff in error; and may have been in a measure an emancipation of Federal control of his person.

III.

That notwithstanding plaintiff in error may be a "citizen "of the United States and of Wisconsin, he is none the less an Indian and, as such, still is the ward of the Federal government so far as his property, derived from it, is concerned, and so remains until the Federal government relinquishes or abandons its guardianship.

IV.

That the United States has at all times exercised and still exercises its guardianship and control of the property of plaintiff in error, as over that of other Indians derived from it; and that such control has never been abandoned nor relinquished.

V.

That the action of the President in imposing the restriction on alienation in the patent of plaintiff in error, contemplated by the Treaty of 1854,—that the consent given by the President to the sale of the timber on the allotted lands in the Bad River Reservation, on certain terms and conditions prescribed,—that the promulgation by the President of rules and regulations and the subsequent modification of Rule 7 thereof, for the sale and manufacture of such timber and the receipt and control of the

proceeds thereof,—and that all the acts and doings in the premises of the officials of the Department of the Interior, including the action of the defendant in error in refusing the demand of the plaintiff in error, were severally acts done in exercise of that guardianship or trusteeship or control over the property of Indians, which the Federal government has consistently and uniformly maintained.

VI.

That the purpose of the restriction on alienation contemplated by the Treaty and imposed in the patents issued pursuant thereto, was to reserve control and supervision by the Federal government over the Indians' property.

VII.

That the Act of Congress approved February 11th, 1901, (31 Stats. at Large P. 766) is the latest expression of the legislative power respecting the relations between the Federal government and the band of Indians of which plaintiff in error is a member.

VIII.

That by that Act Congress recognized the control and supervision of the executive department over the property granted to plaintiff in error.

IX.

That no "right" strictly speaking, of plaintiff in error has been denied to him.

ARGUMENT.

It is necessary to consider the Treaty of 1854 and the acts of the President in execution of the power con-

ferred upon him thereby, the legislation enacted bearing thereon, as well as the consequent acts of the executive department and the parties hereto.

THE TREATY OF 1854. (10 STATS. AT L. 1109)

The Treaty was concluded September 30th, 1854 between Henry C. Gilbert and David B. Herriman, Commissioners on the part of the United States, and the Chippewa Indians of Lake Superior and the Mississippi, and was ratified and confirmed by the Senate January 10th, 1855.

By the terms of Article 1, the Chippewas of Lake Superior and the Mississippi cede to the United States all lands owned by them in common lying East of a certain boundary line drawn through what is now the State of Minnesota, dividing the Indian country of the Chippewas of Lake Superior from that of the Chippewas of the Mississippi, and which ceded lands include the lands afterward reserved in said Treaty for the several bands of the Chippewas of Lake Superior.

By the terms of Article 2, provision is made for the several bands, and so much thereof as concerns this discussion is as follows:

> "Article 2. The United States agree to set apart and withhold from sale for the use of the Chippewas of Lake Superior the following described tracts of land, viz: * * * *
>
> "For the La Pointe Band, and such other Indians as may see fit to settle with them, a tract of land bounded as follows: Beginning on the south shore of Lake Superior, a few miles west of Montreal River, at the mouth of a creek called by the Indians Ke-che-se-be-we-she, running thence south to a line drawn east and west through the centre of township forty seven north, thence west to the west line of said township, thence south to the south east corner of township forty-six north, range thirty -two west, thence west the width of two townships, thence north the width of two townships, thence west one mile, thence north to the lake shore and thence along

the lake shore, crossing Shag-waw-e-quon Point, to the place of beginning. Also two hundred acres on the northern extremity of Madeline Island, for a fishing ground."

By Article 3 under which the title and rights of plaintiff in error are derived, it was provided as follows:

"The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President, may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family or single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs issue patents therefor to such occupants, with such restrictions of the power of alienation as he may see fit to impose. And he may also, at his discretion, make rules and regulations, respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise, as shall be necessary to prevent interference with any vested rights. All necessary roads, highways, and railroads, the lines of which may run through any of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

The remainder of the Treaty contains provisions for certain payments and annuities on the part of the United States and the welfare of the Chippewas of Lake Superior, and are not involved in this discussion.

THE ACTS OF THE PRESIDENT AND CONGRESS IN OBSERVANCE OF THE TREATY.

The boundaries of the lands so reserved for the benefit of the La Pointe band of which the plaintiff in error

is a member, were thereafter defined and the lands surveyed, and such reservation became known as the "Bad River Reservation."

Pursuant to said Treaty the President from time to time assigned to members of said La Pointe band, lands on the Reservation as contemplated by Article 3 of the Treaty, and by general order imposed a restriction on alienation of the assigned parcels to be inserted in all the patents to issue therefor, in the words of the patent of plaintiff in error contained (Printed Record Page 6,) which restriction is that the patentee "*and his heirs shall not sell, lease or in any manner alienate said tract without the consent of the President of the United States.*"

By Act of Congress passed and approved February 11th, 1901, Chapter 350 (31 Stats. at L. 766) it was enacted,—

> "That with the consent of the Chippewa Indians of Lake Superior, located on the Bad River Reservation in the State of Wisconsin to be obtained in such manner as the Secretary of the Interior may direct, the President may allot to each Indian now living and residing on said Reservation and entitled to so reside and who has not heretofore received an allotment, not exceeding eighty acres of land, such allotments to be subject in all respects, except as to the age and condition of the allottee, to the provisions of the third Article of the Treaty with the Chippewas of Lake Superior and the Mississippi, concluded September 30th, 1854.

By virtue of said act and said treaty the selection of plaintiff in error of the lands in the complaint herein described was approved October 1st, 1901, and said lands conveyed to him by patent. (See patent in Printed Record page 6.)

By rules and regulations approved by the President December 6th, 1893, and duly promulgated (Printed Record pages 9-10-11) the consent of the President was given for the sale and the sale authorised, by the Indians

af the Bad River or La Pointe Reservation of the timber standing or being on their respective allotments unto one Justus S. Stearns, under the supervision of the United States Indian Agent for the La Pointe Agency, at certain specified minimum prices to be paid therefor; conditioned, however, upon contracts of a form to be prescribed by the Commissioner of Indian Affairs, being entered into with said Stearns by such of the Indian allottees as desired to sell their timber, which should have force only when approved by the Commissioner of Indian affairs, and "which approval shall operate as specific consent of the executive to the sale of the timber to which the contract relates". (Regulation 2. Printed Record P. 10.)

The regulations provide that said Stearns should establish a mill on the Reservation for the manufacture of said timber into lumber and shingles, and that he give a bond conditioned for the observance of the laws of the of the United States, and performance of the stipulations of the contract etc., and it was further provided therein that;

> 3. "The Indian Agent for the La Pointe Agency, Wisconsin, shall see that the said Justus S. Stearns shall employ Indians in the cutting, moving and manufacturing of timber when practicable, on the same terms as other labor, and said Justus S. Stearns shall agree to employ Indians who may be willing to work in doing the logging authorized hereby."

By the regulations provision was also made for the cutting of timber on the unallotted lands on the Reservation, which does not concern this discussion.

By regulation 7 it was provided as follows: (Printed Record P. 10)

> 7. "After deducting one half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber sold from the unallotted portions of the reservation shall be paid to the Indian Agent, to be

expended for the relief and benefit of the Indians of the Reservation under the direction of the Commissioner of Indian Affairs, and the proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the allotment, countersigned by the Indian agent of the La Pointe Agency, unless otherwise stipulated in contracts with particular Indians."

This regulation was afterwards amended or modified December 29th, 1902 by the President's order as alleged in the complaint (Paragraph 5 of Complaint. Printed Record Page 4) by adding thereto the following,—

"If the Indian Agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit."

Regulation 8 is as follows: (Printed Record P. 11)

8. "The farmer in charge of the reservation shall, under the direction of the Agent, be required to supervise the logging on the reservation under these regulations, to the end that no injustice is done the Indians, and no green or growing timber is cut and removed except in accordance with with these regulations, and all moneys for stumpage shall be paid to him or the Agent, in trust for the Indians or Indian owner, to be by him deposited or accounted for according to the foregoing regulations, unless otherwise stipulated in the contract with such Indian owner."

A contract in writing was entered into bearing date January 8th, 1902, between the plaintiff in error and said Justus S. Stearns (Printed Record Pages 7-8-9) whereby plaintiff in error agreed to sell and said Stearns agreed to purchase the merchantable timber of certain specified kinds at certain prices to be paid therefor by said Stearns "*to the United States Indian Agent for the La*

Pointe Agency in trust for said party of the first part" (plaintiff in error) (Printed Record Page 7.) This contract was afterward enlarged and modified in this, that said Stearns subsequentlly agreed in writing to pay for said timber prices substantially higher *"To the United States Indian Agent at the LaPointe Agency in trust for said party of the first part"* (plaintiff in error) (Printed Record Page 8) in consideration of the approval of said contract by the Commissioner of Indian Affairs; and thereupon May 23rd, 1903, the said contract as modified was approved by the Commissioner of Indian Affairs "subject to the regulations approved by the President December 29th, 1902" (Printed Record page 9.)

A DISCUSSION OF THE QUESTION PURELY AS ONE OF TITLE, AND THE POWER OF CONGRESS OVER THE SUBJECT MATTER.

It can hardly be questioned that the title of plaintiff in error granted by the patent is in fee simple, subject, however, to the restrictions imposed on alienation.

Nor can it be questioned that the United States has the power to grant these lands in the manner adopted.

Art. 4 Sec. 3 Sub. 2 U. S. Const.

which is "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." * * * *

Having this power it must follow that it likewise had the power to remove the restriction on alienation on such conditions or terms as it might prescribe, as in this case, on the condition that the purchase money for the timber of plaintiff in error shall be paid to the Indian Agent having supervision of the Bad River Reservation and held in trust for him and with authority to such Indian Agent to pay therefrom to plaintiff in error, who is a minor and presumably incompetent, only the sum of Ten Dollars (10.00) per month.

The allotment of plaintiff in error was obtained by virtue of said Treaty upon the specific authority, however, of the Act of Congress of 1901, supra, wherein provision was made for "such allotments to be subject in all respects, except as to the age and condition of the allottee, to the provisions of the third article of the Treaty with the Chippewas of Lake Superior and the Mississippi concluded September 30th, 1854." And one of the provisions of that article of the Treaty was that patents may issue to the allottees "with such restrictions of the power of alienation as he (the President) may see fit to impose."

Apart from all considerations of the policy of the Federal government or the reason for reposing an authority or discretion in the President as to what restrictions should be placed on an allottee in the patent securing to him his title, it would seem that the action of the President in the exercise of that authority or discretion could not be subject to review by the courts. The authority or discretion vested in the President by the Treaty to to impose "such restrictions of the power of alienation as he may see fit" is a broad one. If not expressly authorized it is necessarily implied that in a given case the President may make a certain restriction and in another case he may add other or make different restrictions. And it must follow that when the restriction imposed by the President is made to depend or turn upon giving his consent to a proposed sale, lease or manner of alienation, that that consent may be withheld or it may be granted with or without a condition annexed;

The United States Circuit Court of Appeals of the Eighth Circuit in the case of the United States vs. the County of Thurston (143 Fed. Rep. 287 C. C. A.) said where a similar question was involved.

> "The Act of 1902 authorized these heirs to sell and convey their inherited lands only when the proposed sales were approved by the Secre-

> tary of the Interior. *It thereby vested in the Secretary plenary power to permit or to forbid the sales proposed. The whole is greater than any of its parts and includes them all, and the authority to allow or to prohibit proposed sales necessarily included the power to consider and determine the terms and conditions on which such sales should be approved.*" (italics ours)

Such consent when or how or upon what condition, obtained necessarily relates back to the origin of the title, which is to say the Treaty, as the foundation of the right and title of plaintiff in error, and supplies the element otherwise lacking.

The judgment and discretion reposed in the President by the Treaty did not stop with a restriction on alienation but was extended to cover the disposition of the lands in case of the death of the allottee or in case of its abandonment.

See Article 3 of the Treaty where it is provided, "and he may also, at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family, or single person occupying the same or in case of its abandonment by them."

Thus, it will be seen that this discretion is not only broad as respects the action the President may take in granting or withholding his consent to alienation so far as different Indians are concerned, but it is broad in this, that it embraces practically all the conditions and circumstances that may arise respecting the title of the Indian and his relations thereto; that is to say, it covers alienation and encumbrance on the part of the Indian, and it covers the question of its disposition after his death, and it covers the question of its abandonment.

In this connection it is not amiss to say that the authority given the President by the Treaty partakes of the nature of a collateral power of revocation and appointment at common law, where the person or class of

persons to be vested or divested of an estate, or the duration of the estate to be enjoyed, was made to depend upon the will of a given person. Whatever character may be given to the restriction it still remains an element, an inherent quality or qualification, of the title of plaintiff in error and in some measure affects, or limits, or may determine the enjoyment of his estate, the reasons for which will be discussed later.

The plaintiff in error urges that he has a general guardian duly appointed by the County Court of Ashland County, Wisconsin, having jurisdiction of the person and property of plaintiff in error, and that such guardian is the proper party to determine how much shall be paid to and expended for plaintiff in error. This is but saying that the county court is vested with the administration, control and disposal of all his property including that involved herein, for the guardian, its appointee, can only proceed in the matter when specifically licensed and authorized thereto, and for his acts in the premises he must account to that court and receive its confirmation. In answer we call attention to the constitutional provision, supra, and to Article 6 Sub. 2 U. S. Const.

> "This constitution and the laws of the United States which shall be made in pursuance thereof and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

It was further provided by Congress in the Act establishing the Territorial Government of Wisconsin (5 Stats. at L. 10)

> "* * * * * * that nothing in this act contained shall be construed to * * * * * * impair or anywise affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property or other rights by treaty or law, or other-

> wise, which it would have been competent to the government to make if this act had never been passed" * * * * * *.

By Section 7 of the Act enabling the Territory of Wisconsin to form a state government (9 Stats. at L. 56) it was provided,

> "That the following propositions are hereby submitted to the convention which shall assemble for the purpose of forming a constitution for the State of Wisconsin for acceptance or rejection; and if accepted by said convention and ratified by an article in said constitution, they shall be obligatory on the United States * * * *. Subd. 5. * * *. That the foregoing propositions herein offered are on the condition that the said convention, which shall form the constitution of said State, shall provide by a clause in said constitution or an ordinance, irrevocable without the consent of the United States, that said State shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers thereof" * * * * *.

And by the constitution of Wisconsin (Art. 2 Sec. 2) (Wis. Stats. 1898 P. 76.) The propositions contained in said act were accepted as follows:

> "It is hereby ordained that this state shall never interfere with the primary disposal of the soil within the same by the United States, nor with any regulations Congress may find necessary for securing the title in such soil to bona fide purchasers thereof * * * * *".

And we urge that the United States has granted to plaintiff in error the lands in question and has seen fit to attach to such grant a restriction of his power of alienation thereof without the consent of the President of the United States; that the consent of the President has been obtained for the sale of the timber on the lands of plaintiff in error, conditioned upon its being made in

a particular way and the proceeds being disposed of for the ultimate benefit of plaintiff in error in a particular manner; consequently that the County Court of Wisconsin in seeking, taking or assuming by itself, or through its appointee, jurisdiction of these lands of plaintiff in error or of the fund into which the United States may have so caused the lands to be transformed, interferes with the method adopted by the United States in disposing of said lands of plaintiff in error; and that a judgment or decree of that court controlling or disposing of said lands or of the fund derived therefrom by the United States must embarass, ignore and set at naught the power so expressly reserved by the United States to accomplish its ends; unless there be some other act or provision of Congress operating directly to modify or give other effect to that method.

Gibson vs Choteau, 80 U. S. 92
United States vs. Rickert, 188 U. S. 432;
Smith vs Stevens, 10 Wall. 321;
Mungosah vs. Steinbrook, 3 Dill. 418;
McCulloch vs. Maryland 4 Wheat. 316;

where Chief Justice Marshall said,

> "The states have no power, by taxation or otherwise, to retard, impede, burden or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government".

Farrington vs. Wilson 29 Wis. 383;

which was a case considered by the Supreme Court of Wisconsin wherein recovery of possession was sought of lands patented to one Antoine Grignon, an Indian, with a similar restriction of the power of alienation. The defense was that Grignon had conveyed, though without the Presidents' consent, and that the plaintiff had been cut off by a tax deed. The court through Chief Justice Dixon say:

"The validity of the restriction found in the treaty and contained in the patent of the land by the United States to Antoine Grignon "not to be leased or sold by the grantee to any person or persons whatever without the permission of the President of the United States" is unquestionable. The law on this subject is thus summed up by the Supreme Court of the United States in a recent case. (Gibson vs. Choteau, 80 U. S. 92.) With respect to the public domain the costitution vests in Congress the power of disposition and of making all needful rules and regulations. *That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it and to designate the person to whom the transfer shall be made.* No state legislation can interfere with this right or embarass its exercise, and to prevent the possibility of any attempted interference, a provision has been usually inserted in the compacts by which the new states have been admitted to the union, that such interference with the primary disposal of the soil of the United States shall never be made". * * * * * *

For the same reason that lands allotted to Indians, inalienable for certain periods of time or except upon condition, which are instrumentalities lawfully employed by the nation in the exercise of its powers of government to provide, support and instruct the Indians are exempt from taxation by any state or county during the period of the trust; it has been held that the proceeds of the sales of such allotted lands, by the Indian heirs of the allottees, deposited by direction of the Secretary of the Interior, in a bank to the credit of the heirs, subject to their check only when approved by the Indian Agent or officer in charge, are held in trust by the United States for the same purposes as were the lands, and are exempt from taxation by any State or County.

United States vs. Thurston County 143 Fed. 287 (C. C. A.)

This principle, that the operations of the constitutional laws enacted by Congress cannot be controlled by state legislation, applies as well to the courts of the several states and to the federal courts.

Bagnell ys. Broderick 13 Peters. 436;
Wilcox vs. Jackson, 13 Peters 498;
Gile vs. Hallock 33 Wis. 523;

In the latter case the point involved was an execution levy on lands secured from the United States under the "Homestead Act" wherein the exemption from seizure and sale for antecedent debts is greater than that allowed under the state law. The court speaking through Chief Justice Dixon say:

> "Congress is to judge and determine for itself what may and may not be a needful rule or regulation in the premises, and such judgment having been exercised and rules and regulations made, it is not for the courts to overrule its determination. This principle in the interpretation of written constitutions is well settled and there seems to be no room to doubt its application to the clause in question. If, therefore, when providing for the disposition of the public lands and territory belonging to the United States, Congress deemed it advisable and necessary in furtherance of that object to declare such exemption, the validity of such regulation is not the proper subject of judicial criticism or examination. The necessity for the regulation rests in the discretion of Congress, and its decision is conclusive in all other places and before all judicial tribunals. The enactment becomes the supreme law of the land and the judges in every state are bound by it."
>
> See also Hitchcock vs. United States,
> ex rel "Bigboy" 22 App. Dist. Col. 275;
> known as "The Bigboy Case."

where the Court say:

> "but when the United States as guardian of the Indians collectively and individually, seeks to secure specified property to them in such manner as they shall not improvidently squander it, we see no

> reason why the United States may not limit their own grant as they see proper. *We see no reason why they might not have done so with white settlers on the national domain, if they had deemed it expedient to do so.* (italics ours)

But it will be urged that this argument, if of force, has application only by reason of the fact that plaintiff in error is a minor, and necessarily any action in his behalf must be instituted and prosecuted with the sanction of the court acquiring jurisdiction, by reason of his minority, over his property and estate; and that if plaintiff in error were an adult, then no state court would be seeking to interfere with the method the United States adopted for securing to him his allotment and the benefit of it, and that his proceeding in the federal court would contravene no inhibition of congress. This seems to us to be sufficiently answered by the constitutional provision above quoted ("The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States.")

We have seen that the Treaty of 1854 is the origin of the title of plaintiff in error; that by the act of Congress of 1901, supra, Congress enlarged and extended the scope and effect of that Treaty to include a class of Indians, of which plaintiff in error, is one; and that it was there enacted that such allotments shall be subject in all respects, except as to the age and condition of the allottee, to the provisions of the third article of that Treaty; that the third article of the Treaty provided that the President shall in causing patents of the lands to issue, impose therein such restrictions on alienation as he may see fit.

Congress has thus given an expression of its power. It has reposed in the executive branch of the government a discretion and an authority and a judgment to be exercised over a subject of which it is supreme; and by the exercise of that discretion and authority the executive

has but done the will of that supreme power. How then, can the courts overrule the determination of congress or control the exercise of that executive discretion?

With regard to the judicial power in cases of this kind, it has been the settled doctrine of this court from the earliest times that there is a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that with respect to the former, there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been; but with respect to ministerial duties an act or refusal to act is, or may become, the subject of review by the courts.

Marbury vs. Madison 1 Cranch 137;
Decatur vs. Paulding 14 Peters 497;
Brashear vs. Mason 6 How. 92;
Kendall vs. the United States, 12 Peters 524;
United States vs. Edmunds 5 Wall. 563;
United States vs. Schurz, 102 U. S. 378;
United States vs. Raum, 135 U. S. 200;
Noble vs. Union River Logging R. Co., 147 U. S. 165;
West vs. Hitchcock 205 U. S. 80-85.

Can it be sucessfully contended that this plaintiff in error could have proceeded by mandamus against the President and compelled the issuance to him of a patent to this allotment without restriction on alienation; or if having accepted a patent, as in this case, containing such restrictions, could he by mandamus compel the President to yield consent to his sale of said lands or of an interest therein, as the timber standing thereon; or could he, properly gaining such consent,so compel the removal or withdrawal of a condition annexed to that consent?

That the acts of the President in assigning to individual Indians specific portions of the Reservation,–in patenting lands to allottees,–in imposing restrictions on

alienation,–and in removing those restrictions, do involve the exercise of judgment and discretion and are not ministerial acts seem on their face incontrovertible.

Hitchcock vs. United States ex rel "Bigboy" supra.

Bigboy was a member of this same band of Bad River Indians to which plaintiff in error belongs. His timber was sold to the same person by a contract of the same form, upon the same consent, and upon the same condition, that the proceeds thereof be deposited with the Indian Agent in trust for him, as in the case of plaintiff in error. Bigboy brought an action against the Secretary of the Interior and the Commissioner of Indian Affairs to compel, by mandamus, the payment to him of the moneys so held in trust and the court there said:

> "The very structure of the petition in the case implies that the action sought to be controlled is one of administrative propriety, involving judicial discretion rather than a merely ministerial duty."

The determination of that question necessarily determines the issues herein; for can it be said that any limitation was placed on the exercise of that discretion, or that at any stage that discretion was exhausted? Granting that the President had authority for his acts, his jurisdiction does not depend upon his decision being right.

West vs. Hitchcock supra.

It must follow, therefore, that the creation of a trust of the funds derived from the sale of the allotment of plaintiff in error, or of a specific interest therein, as the timber standing thereon, for his benefit, as the result of the exercise of such power of congress and the judgment and discretion of the executive cannot be challenged, and is beyond the criticism of any court; and that no court has the power to give the effect by its decree that that trust be executed.

A DISCUSSION OF THE QUESTION FROM THE STANDPOINT THAT THE FEDERAL GOVERNMENT IS EXERCISING GUARDIANSHIP OF THE INDIANS' PROPERTY.

What has been said thus far has tended mainly to a discussion of the title of plaintiff in error, its derivation, and the effect to be given it, but it is well to consider the reasons and considerations of policy which moved the federal government in stipulating in the Treaty that the lands should be patented to the allottees, but with such restrictions on alienation as the President might see fit to impose, and again in causing the allotments to be inalienable without the President's consent, and further in reserving the control of the proceeds of sales of timber and restricting payment to the allottees entitled thereto.

In dealing with the Indians it has ever been the policy and manifest purpose of the Federal government to hold or reserve control of the instrumentalities employed by it in the lawful exercise of its powers of government to protect, support and instruct the Indians. The lands allotted or granted to Indians have been one of the principal instrumentalities of the Federal government in discharging its duty as guardian of the Indians.

United States vs. Rickert, supra;
United States vs. Thurston County, supra.

And it has been its policy throughout in negotiating treaties with Indian tribes and in enacting legislation for the benefit of the Indians to provide restrictions on alienation of lands donated to them of greater or less stringency and sometimes in varying form and duration.

The purpose of the restriction upon voluntary alienation is protection of the Indian from the cunning and rapacity of his white neighbors.

Goudy vs. Meath 203 U. S. 146;
United States vs. Thurston County, supra

The Indians have ever been the wards of the United States, and how the guardian's care and duty shall be exercised is a political question and it is not the province of the courts to intrude upon the domain committed by the constitution to the political department of the government or in effect determine questions of mere governmental policy.

Cherokee Nation vs. Georgia, 5 Peters, 1;
Worcester vs. Georgia 6 Peters 515;
United States vs. Kagama 118 U. S. 375;
The New York Indians 5 Wall, 761;
The Kansas Indians 5 Wall 737;
Cherokee Nation vs. Hitchcock 187 U. S. 294;
Lone Wolf vs. Hitchcock, 187 U. S. 553;
Beecher vs. Wetherby 95 U. S. 517;
United States vs. Holliday 3 Wall. 407;
West vs. Hitchcock 205 U. S. 80-85 decided at the Oct. 1906 term.

To hold otherwise would produce great confusion and would transfer from the department of the Interior to the courts most of the controversies relating to Indian affairs, now properly disposed of by it.

United States vs. Boyd 83 Fed. Rep 547;
Bem-Way-Bin-Ness vs. Eshelby 87 Minn. 108.

The Indians are the wards of the nation and are not wards of the court. The power which now speaks for them is the legislative power of the United States,

Brown vs. United States 32 Ct. Claims 432 (1897)

In United States vs. Kagama, supra, where the defendant, an Indian, was indicted for the murder of another Indian on a reservation in California, the court say in discussing the relations of the Federal government and the Indians;

> "From their very weakness and helplessness so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of

> protection and with it the power. This has always been recognized by the executive and by Congress and by this court whenever the question has arisen. * * * * * it must exist in that government because it never has existed anywhere else, because the theater of its exercise is within the geographical limits of the United States, and because it has never been denied, and because it alone can enforce its laws on all the tribes.

Authorities may be multiplied showing that the federal government is supreme in all matters relating to Indians, over which it still maintains its guardianship; and consequently that state governments and courts cannot usurp that control or jurisdiction.

It is not left to the Indian to withdraw himself or his property from the guardianship and control of the the United States. When a tribe of Indians is placed under the charge of an Indian Agent by treaty or otherwise, each member of such tribe is under the charge of such agent, within the purview of Section 2139 R. S. and no member thereof can dissolve his tribal relation or escape such charge by absenting himself from such reservation, or otherwise, without the consent of the United States.

> United States vs. Earl 17 Fed. Rep. 75 (C. C. Ore.)
>
> Farrell vs. United States 110 Fed. Rep. 942 (C. C. A.)
>
> Regulations of the Indian Office 1904 Sec. 107; United States vs. Holliday, supra.

This latter case was a prosecution under R. S. 2139 for selling liquor to an Indian who had removed from the reservation and claimed to have severed connection with his tribe, and he had voted at county and town elections in Michigan as he was authorized to do by the laws of that state. The Indian received an annuity under a treaty with the United States and was represented in that matter by the chiefs or head men of his tribe, which

was under an Indian superintendent. Involved in that case were the constitution and laws of Michigan withdrawing that tribe of Indians from the laws of the United States regarding the sale of liquor to Indians. The Court say,—

> "In reference to all matters of this kind (the decision of the Secretary of the Interior and Commissioner of Indian Affairs that tribal organizations should be preserved for any purpose) it is the rule of this court to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs. If by them those Indians are recognized as a tribe this court must do the same. If they are a tribe of Indians, then by the constitution of the United States they are placed for certain purposes within the control of the laws of Congress."

See also United States vs. Boyd supra;

State of Minnesota vs. Campbell, 53 Minn. 354.

And it is said in Lowe vs. United States 37 Ct. Claims 413 (1902,)

> "The United States having the exclusive guardianship of the Indian, that guardianship exists in law so long as it is not renounced or disavowed upon the part of the guardian. It is not within the power or caprice of the ward to terminate the relation." * * *

Up to the time of the passage of the Dawes Act 24 Stats. 389, 1887, the Indians were certainly wards of the nation, both as to person and estate.

Lone Wolf vs, Hitchcock 187 U. S. 553;

United States vs. Kagama, supra.

It is uncontroverted that ever since the passage of the Dawes Act the government has assumed to act as the guardian of the property of the Indians (that is, of property of Indians situated as is this one under consideration,) and that the government has thus given us a practical construction of the Dawes Act as understood by the President and the Department of the Interior.

The Department has proceeded on the theory that all guardianship included the two functions, that of guardianship of the person and guardianship of the property, or, as it is expressed in the civil law, of tutor and curator

1 Blackst. Com. 46;

Sec. 3964 R. S. Wis.

And it seems to be clear that the federal government may continue as to its former wards any part of the system of pupilage which had theretofore obtained, until specifically renounced or disavowed..

This court has held

In re Heff 197 U. S. 488,

that the Dawes Act operated as a renunciation of the function of tutor, or guardian of the person, on the part of the United States, to the extent that Indians in the classes described therein have been freed from police regulation on the part of the federal government.

See McKay vs. Kalyton 204 U. S. 458-467.

The phraseology of the Act indicates that this distinction was contemplated by congress, inasmuch as the Act confers upon the Indian "all the rights, privileges and immunities "of citizens, but provides that this change in the Indians' status shall be brought about "without in any manner impairing or *otherwise affecting* the right of any such Indian to tribal *or other* property." That is, to say, the relation of the Indian to property, tribal or otherwise, is and is to remain the same as though the Dawes Act had never been passed.

But it has never been held, either by the executive or judiciary, that the government has renounced its function of curator, that is guardianship of property circumstanced as is the property in controversy.

On the other hand the supreme court of the United States has expressly held that Indians circumstanced as is plaintiff in error "are yet wards of the nation in a condition of pupilage or dependency and have not been discharged from that condition;" and that in spite of the

Dawes Act lands allotted to the Indians with power of alienation conditioned upon the consent of the President, in that case for twenty-five years and in this case indefinitely "are held by the United States for the period * * * in trust for the Indians, such trust being an agency for the exercise of a federal power and therefore outside the province of state or territorial authority"

United States vs. Rickert, supra;
West vs. Hitchcock 205 U. S. 80-85.

And in the Heff case at page 509 a sharp distinction is drawn between civil and political rights, which are reached by the Dawes Act and "mere property rights which are not.

See also United States vs. Rickert, supra,
Cherokee Nation vs. Hitchcock, supra.
McKay vs. Kalyton, supra.

The question arises here then has the government of the United States in imposing a restriction upon alienation and in removing that restriction upon a condition imposed by it, and in holding and retaining the proceeds arising from the sale of the timber been guilty of usurpation?

Inasmuch as it must be conceded that the federal government is still acting as curator of this Indian's property, ie. guardian of his property, and that its acts in relation thereto are subject to no limitation or control, it must follow that it was competent for the government to create a trust in itself, by transforming or causing to be transformed the property given the Indian into a fund to be held by it and its officers, for the benefit of that Indian.

Tomkins vs. Campbell, 129 Wis. 93.

This was an action brought against Campbell, the defendant in error in this suit, as the Indian Agent having supervision of the Bad River Reservation, for the recovery of moneys held in trust by him arising from the sale of the timber of one Sailor an allottee on the Bad River Re-

servation. Such timber was sold under the same consent granted to the plaintiff in error herein and was made upon precisely the same condition, that the money arising therefrom should be held in trust by the Indian Agent.

The Court in that case say:

> "The simple question presented is whether Sailor has absolute control and power of disposition over the money received by the Indian Agent in payment for the timber cut from Sailor's allotment of land, or whether his power of disposition is limited and subject to the approval of the Indian Agent." * * * *
>
> "While it must be admitted that the Indian allottee under the circumstances stated has become a citizen, it does not follow therefrom that the government has thereby thrown aside all the barriers and restrictions which it had so carefully erected to protect him from his natural improvidence. Notwithstanding he was a citizen, the government in dealing with him and granting him rights of property could, if it chose, surround those rights with safeguards or limitations intended for his own welfare and to prevent his squandering his property.
>
> The treaty of 1854 clearly contemplates that his ownership of land shall be subject to substantial restrictions upon the right of alienation, and these restrictions were carried into the patent issued long after the passage of the Dawes act, by provisions which deprived him of the power of alienation in any manner without the consent of the President. These restrictions upon alienation of the land, so industriously inserted in the patent, must be borne in mind when considering the intent of the government in its regulations as to the sale of the timber and the disposition of the proceeds. So, also, the pre-existing relations of guardianship which the government has always maintained toward the Indian must be kept in view.
>
> In view of these considerations, what is the natural meaning of the provisions of the contract,

that the money for the timber is to be paid to the Indian agent in trust for the Indian, and that it is to be deposited in bank by him subject to the check of the Indian countersigned by the agent? To our minds these provisions can not be construed as meaning that the government intended to abolish the safeguards which it erected to guard against the Indian's improvidence, but rather that it intended to place the proceeds of the land practically in the same position as the land itself, namely, subject to disposition only by the Indian when such disposition is approved by the government acting through its Indian agent, instead of through the President. There is clearly no reason why the Indian should be prevented from selling or alienating his land, and should be given free disposal of the moneys arising from the sale of the timber thereon, which doubtless constituted the princ ipal part of its value. On the contrary, there is every reason why there should be substantially the same restrictions upon the disposal of his money as upon the disposal of his land.

In view of these considerations we find no difficulty in construing the provisions of the contract and rules above referred to as meaning that the Indian's power of disposition of the money received from the sale of his timber is subject to the approval of the agent, and hence that the the plaintiff can not recover.

To which is cited: "The Bigboy Case" supra and United States vs. Thurston Co. supra.

By the opinion of the Circuit Judge in the case at bar in the court below (Printed Record P. 12) it was there said "In view of the power given to the President by the treaty and the execution of such power by him through such rules and regulations, I think that the money claimed by the plaintiff is within the control of the Interior Department, and is held in trust by the United States for the plaintiff's benefit."

Therefore, it would seem that on the proposition

that the Federal government has ever maintained and still retains guardianship of the property of the Indians, a province which is solely occupied by the legislative and executive departments of the government, that no court has the power by its decree to say that that relationship shall cease or has ceased,

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WHAT BEARING HAS THE CITIZENSHIP OF THE INDIAN UPON THE QUESTION?

Intimately concerned with the discussion of the previous questions is that of citizenship. It is said that "citizenship.' conferred upon the Indian has *ipso facto* dissolved all those preexisting relations between the Federal government as guardian of the person and property of the Indians, and the Indians as wards of the nation; that it is an emancipation from that bondage which they have long been under, and is the key by which those shackles are cast off.

To what extent this is so is concretely the question we have been given the privilege to examine. Without the entrance of "citizenship" into the field of debate,– its purpose, scope and reach,– this suit would never have been brought.

What is "citizenship?" As an ancient writer has expressed it, it is; "where there is one common law there is likewise a common right, and those who hold these in common are to be esteemed, as it were, fellow citizens." Citizenship is thus a civil and political status. Under our system persons admitted to that status become constitutent members of the sovereignty, and perforce possess equal "rights, privileges and immunities."

Necessarily those rights, etc. cannot be, as between one and his fellow citizens, other than relatively or reciprocally equal. What is the proper balance, and when is it maintained?

As says Montesquieu,

> "The true spirit of equality does not imply that every body should command, or that no one should be commanded, but that we obey or command our equals. It endeavors not to shake off the authority of a master but that its masters should be none but its equals."
>
> Spirit of Laws Vol. 1 P. 128

Granting it to be true that plaintiff in error is a citizen of the state of Wisconsin by virtue of the Dawes Act wherein is the equality of those "rights, privileges and immunities" guaranteed to him being denied, and does such determination of his civil and political status resolve the questions raised in this suit in his favor? For the answer we must look to that act fixing the Indian's status. The act must be construed together as a whole. In and by it express provision is made for allotting the reservation lands, the title whereof shall remain and be held by the United States in trust for the allottees for a definite period, and in and by it it is declared (24 Stats. at L. 388)

> "Sec. 6.That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal of the state or territory in which they may reside. * * * * * And every Indian born within the territorial limits of the United States to whom allotments shall have been made under provision of this act, or under any law or treaty, * * * * * is hereby declared to be a citizen of the United States and is entitled to all the rights, privileges and immunities of such citizens, * * * * without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property."

The logic of the argument of plaintiff in error is that though by the act a trust for the allottee Indians is de-

clared, yet that that trust is in the same breath executed.

Beck vs. Flournoy 65 Fed. Rep. 30.

Was such a result within the contemplation of Congress? Provision was there made for the present and future welfare of the Indians by the sole authority over them and then charged with that duty; such provision was made in a manner similar to that theretofore employed in the discharge of its duty and guardianship; and as a matter of fact it has continued,—that is, it has retained its guardianship of this class of property given by it to the Indians and in regard to which it reserved control. How this can be construed as a violation of any right, privilege or immunity of the nascent citizen is incomprehensible.

"CITIZENSHIP" AS VIEWED BY THE "HEFF CASE" AND OTHERS.

Citizenship of Indians seems to have taken on in the minds of some a new significance since the decision of this court In re Heff 197 U. S. 488, but it is difficult to perceive how a case involving only the question whether certain classes of Indians are subject to police regulation by the Federal government can be considered an authority for the proposition that the continued exercise of supervision by the Federal government of the Indians' property is unjustified where that property is wholly derived from the Federal government, conditioned upon its supervision. Whatever may be read between the lines of the Heff case it is authority for nothing more than this; that the civil and political status of Indian allottees was fixed by the act of 1887; and that the police regulations of the United States with reference to the sale of liquor to the Indians are without force to control the acts of an allottee Indian who has become a citizen of Kansas, outside of the reservation.

Involved in the discussion of "civil and political status" is the proposition and for which the case stands

an authority, that the guardianship of the person of the Indian may be relinquished by the Federal government without relinquishing the guardianship or trusteeship of his property.

It is there said, P. 509;

> "This emancipation from Federal control is not affected by the fact that the lands it has granted to the Indian are granted subject to a condition against alienation and encumbrance, or the further fact that it guarantees to him an interest in tribal or other property."

The court of appeals of the District of Columbia in the "Bigboy" case supra, well said,

> We are unable to see what part the fact of the citizenship of the relator performs in the present case. He might well be a citizen, with all the rights and privileges of citizens, and yet be disqualified from the exercise of absolute ownership over certain specified property. If it be conceded that among the rights of citizenship is that of freely acquiring, holding, and disposing of property, yet it does not follow that the grantor of property may not place restrictions upon its use by the grantee or person for whose benefit it is granted. It is of daily experience that, in the matter of wills, marriage settlements, deeds in trust, and other similar arrangements, property is tied up and the right of alienation and disposal of it is restricted; and yet it has never been supposed that thereby the right of citizenship of the grantee or beneficiary is impaired. The provision made in the present and other similar cases, for those who are or have been wards of the Government of the United States, are analogous to ordinary trusts wherein it is sought, by restricting the right of disposition, to guard the beneficiaries against the results of their own improvidence; and we fail to find in either any impairment of the right of citizenship. * * * * *The matter of citizenship is an entirely extraneous thing, and has nothing whatever to do with the case*" (Italics ours.)

The United States Court of Appeals for the Eighth Circuit in the case of the United States vs. Thurston County, supra, say, at P. 288;

> "Their civil and political status, however, does not condition the power, authority or duty of the United States to exert its powers of government to control their property, to protect them in their rights, to faithfully discharge its legal and moral obligations to them, and to execute every trust with which it is charged for their benefit."

To which is cited,

In Re Heff, supra;

Buster vs. Wright, 135 Fed. Rep. 947 (C. C. A.)

Wallace vs. Adams, 143 Fed. Rep. 716 (C. C. A.)

As was said by Mr. Justice Brewer in the Heff case,

> "Of late years a new policy has found expression in the Legislation of Congress,–a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes free from national guardianship, and charged with all the rights and obligations of citizens of the United States. Of the power of the government to carry out this policy there can be no doubt, It is under no constitutional obligation to perpetually continue the relationship of guardian and ward. It may at any time abandon its guardianship and leave the ward to assume and be subject to all the privileges and burdens of one *sui juris*. And it is for Congress to determine when and how that relationship of guardianship shall be abandoned. It is not within the power of the Courts to overrule the judgment of Congress."

The determination of who are citizens is a political or legislative question and not a judicial one.

Wallace vs. Adams, supra,

Has Congress, however, in view of the legislation on the subject, determined when and how that relationship of guardianship shall be abandoned as respects the

the property derived from it. or that it has been abandoned? This plaintiff in error did not obtain his patent by virtue of the Dawes Act, and if there were any force in in his contention it would be neutralized by the act of Congress of 1901 (31 Stats. at Large P. 766) on the specific authority of which the plaintiff in error acquired his allotment, subject in all respects to the restriction on alienation lawfully imposed by virtue of the third article of the Treaty of 1854. This is the latest expression of Congress with reference to the relation of guardianship over the property of plaintiff in error. It is idle to say that this plaintiff in error has been emancipated by the act of 1887 from the control or guardianship of the United States so far as his property rights are concerned, where the control of the disposition of those property rights is expressly reserved by the guardian, notwithstanding he may be a "citizen" in a civil and political sense.

THERE IS NO QUESTION OF RIGHT INVOLVED.

It will be noted that there is no question of the right of a citizen constitutional or otherwise, involved in this case.

It is a mere question whether the fund arising from the sale of this timber shall be kept and administered by the curator appointed by the United States government or by a guardian appointed by the county court of Ashland County, Wisconsin.

This certainly does not involve any constitutional right, for the reason that the 4th subdivision of section 31 of Article IV. of the constitution of Wisconsin, as it it now stands by virtue of amendment, works a prohibition upon the legislature of Wisconsin only, and no law passed by that legislature is involved.

The case does not involve a question of general rights,

for the reason, as above stated, that the control of estates of infants and incompetent persons is a matter of governmental power, and may be exercised by the sovereignty in any way that it sees fit, and not necessarily through the judiciary; and that "the general superintendence and protective jurisdiction of the court of chancery over the persons and property of infants is a delegation of the rights and duties of the crown,–" that is to say, of the sovereign.

2nd Story's Comm. Eq. 565.

And as Senator Verplanck in Cochrane vs. Van Surlay, 20 Wend. 365-380,

says:

> "The same power then which the sovereign authority has a right to delegate generally it may certainly exercise specially in the discretion of its officers; for the *authority is not judicial, but rather parental or tutelary.*"

The sole question raised by this case then is one of convenience, or rather, one of preference.

Congress in the Dawes Act expressly provided that the grant of citizenship to the Indian allottee should not affect his right to tribal or other property.

This would seem to reserve to the government a plenary control over these rights; *a fortiori* is there reserved to the government control over mere matters of management, that is safeguarding moneys where no right is impaired, infringed or in any way affected.

Viewing the matter from the standpoint of the Indians' welfare, there can be no question but that the care of these funds by the Indian agent is highly beneficial to the Indian; and that his welfare will be much better conserved than by placing the fund in the hands of a guardian appointed by a minor state court.

At any rate, the Department has so decided, and we claim has been wise in its decision.

The supreme court of Wisconsin has absolutely endorsed these views in the case of

Tomkins vs. Campbell, above cited.

And the case presented here is on all fours with that case inasmuch as the guardian, by bringing this action, has necessarily ratified and based his rights upon the contract of the minor, even though such contract might have been theretofore voidable. So that, for the purposes of this case, the right urged here is no higher than the right urged in the Wisconsin case. And the consideration urged here in favor of the plaintiff is much weaker, since it is simply the contention that a guardian appointed by a Wisconsin court can administer and care for this fund during the minority of his ward better than the Indian agent, who has been designated by the government by reason of qualifications which his experience with Indian affairs has brought to him.

In concluding we call attention to the case in this court of United States vs. Paine Lumber Co., 206 U. S. 467 decided May 27. 1907, which it will be argued is decisive of the questions herein.

This case does not conflict with the views herein expressed.

In that case the timber had been purchased from the Indian allottees and a fair price had been paid to them therefor. The United States undertook to compel the defendant to pay this price over again to the government; and the action proceeded upon a complaint in which it was alleged that the United States was the owner of the land and of the timber; and the right of the government was predicated upon absolute ownership, unqualified by any trust.

The sentence in the opinion: "The land is not the land of the United States, and the timber, when cut, did not become the property of the United States." is a complete answer to the right set up in the complaint, and

disposes of the case. The only, question involved was that of the title of the Indians.

Neither in that action, nor in its dealings with the Indians therein referred to, had the United States attempted to exercise or in any way exercised guardianship of their estate. The action was not brought by the government as such guardian, nor was it brought for the benefit of those Indians in any way, nor was any question of "citizenship" involved. The question presented here therefore did not and could not arise in that case, and consequently could not be decided, nor can the opinion in that case be taken to bear upon the questions presented here.

Under the treaty which governed in that case the allottees became the owners of the land, and the government retained merely the naked legal title, with all beneficial ownership in the Indians.

Apart from any technical question of law, it would have been manifestly unjust to compel payment over again to the United States of the purchase price which had already been paid to the beneficial owners of the thing sold, particularly where the payment had been made by reason of the total failure of the government to exercise any supervision of the matter by way of guardianship of the proceeds of such sales or otherwise.

And upon technical as well as substantial grounds, the government could not have recovered, since the title declared upon was that of an owner, whereas the title which existed, if any was that of a mere naked trustee of the title, unaccompanied by any acts on the part of the government which showed or tended to show that it was any more, or claimed to be any more, than a passive trustee.

Therefore, in conclusion, we respectfully submit that the demurrer was rightly sustained by the lower court on the grounds, namely,

1. That the restriction of alienation was lawfully imposed and is a condition of title, and that it was competent for Congress and the executive to extend that restriction to the proceeds of the sale of an interest in that allotment, as standing timber.

2. That independently, the government has been the guardian of the Indians of which plaintiff in error is one, and that it is still in the exercise of that guardianship, and that it has not renounced or disavowed it.

3. And that though citizenship has been conferred upon the Indians and on this plaintiff in error, such continued guardianship of the property of plaintiff in error by the United States is no invasion or infringement of his rights and privileges as such citizen, and that no "right" or "rights" of plaintiff in error are involved.

CHARLES QUARLES,

FRANCIS H. De GROAT,

As Amici Curiae.

STARR v. CAMPBELL.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WISCONSIN.

No. 132. Argued January 23, 24, 1908.—Decided February 24, 1908.

The restrictions on the right of alienation of lands to be allotted in severalty under the Chippewa Treaty of 1854 extend to the disposition of timber on the land as well as to the land itself; and the consent of the President to a contract for cutting timber does not end his control over the matter; he may put conditions upon the disposition of the proceeds. *United States* v. *Paine Lumber Co.*, 206 U. S. 467, distinguished.

THE facts are stated in the opinion.

Mr. W. M. Tomkins for plaintiff in error:

Indian allottees under the Chippewa treaty of 1854 are vested with sufficient title in their allotments to authorize the sale by them of their standing timber without the approval of the President. *United States* v. *Paine Lumber Co.*, 206 U. S. 467.

In this case the United States has parted with the legal title by a patent in the usual form, except that it contains a restriction, that the grantee shall not sell, lease or in any manner alienate the tract of land without the consent of the President. Such a patent conveys the title in fee simple to the grantee. *Libby* v. *Clark*, 118 U. S. 250; *Schrimpscher* v. *Stockton*, 183 U. S. 290; *Lykins* v. *McGrath*, 184 U. S. 169.

The restriction in the patent is simply upon the alienation of the "tract of land." By the terms of the treaty the land is assigned to the allottee for his separate use. The allottee can use timber land if he cannot dispose of the timber. *United States* v. *Paine Lumber Co.*, 206 U. S. 467.

What the allottee can himself do, he can also do by an agent. If he has the right to cut the timber himself he can certainly authorize another to cut it for him.

The sale of the standing timber in this case was consented to by the President. The land is not the land of the United States, and the timber when cut did not become the property of the United States.

When consent to alienation is given, the President's authority over the matter is ended. Permission once given cannot be revoked. *Doe* v. *Beardsley*, 2 McLean, 412. Limitations and restrictions on the use of property are not favored, and although they will be enforced when the intent is clear, ordinarily all doubts will be resolved against them. *Wakefield* v. *Van Tassell*, 95 Am. St. Rep. 267, note A, page 214. The consent of the President is no formal proceeding; it is a mere matter of permission. *Lomax* v. *Pickering*, 173 U. S. 26.

Where the United States conveys property to an Indian absolutely, that is, without any condition or restriction on its alienation, he can dispose of the same at his pleasure and give good title to his grantee. *United States* v. *Ritchie*, 17 How. 525; *Mann* v. *Wilson*, 23 How. 457; *Crews* v. *Burchman*, 1 Black, 352; *Wilson* v. *Wall*, 6 Wall. 83; *Pennock* v. *Commrs.*, 103 U. S. 44; *Elwood* v. *Flannigan*, 104 U. S. 563; *Jones* v. *Meehan*, 175 U. S. 1.

The patent in this case is not one of the so-called trust patents, provided for in the Dawes Act of February 8, 1887, under which the United States retains the legal title, and is the trustee with the rights of such trustee to the trust property in whatever form it may be found.

Here the patent conveys to the Indian the absolute title in fee subject only to the restriction upon alienation.

The Solicitor General for defendant in error:

That conferring citizenship upon an Indian does not necessarily free him from the guardianship of the United States in respect to property granted him by the General Government has been recognized both by this and other Federal courts. *United States* v. *Rickert*, 188 U. S. 432; *Matter of Heff*, 197 U. S. 488, 508, 509; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294,

307, 308; *United States* v. *Thurston Co.*, 143 Fed. Rep. 287, Circuit Court of Appeals, Eighth Circuit; *National Bank of Commerce* v. *Anderson*, 147 Fed. Rep. 87, Circuit Court of Appeals, Ninth Circuit; *Hitchcock* v. *United States ex rel. Bigboy*, 22 App. D. C. 275.

The restriction upon alienation embraces the sale of the standing timber. *Hitchcock* v. *United States ex rel. Bigboy*, *supra*. It is an elementary principle of the common law that standing timber is a part of the realty. *United States* v. *Cook*, 19 Wall. 591, 593; Blackstone's Commentaries, Bk. 2, p. 18; Williamson, Real Property, pp. 78, 79.

It seems fair to say that, as Congress had been repeatedly advised by the reports of the Interior Department of the conditions as to "logging" upon the Bad River and other reservations in Wisconsin, it is both the legislative and executive construction of the treaty of September 30, 1854, with the Chippewas, that the restriction upon alienation covered the timber upon such lands. *United States* v. *Paine Lumber Co.*, 206 U. S. 467, discussed and distinguished.

Assuming that the sale of the timber would be an alienation of the land within the meaning of the treaty of 1854, and the patents issued thereunder, and that such timber could not therefore be sold without his consent, the President, as a condition of his consent, might make any proper regulation with regard to the disposition of the proceeds thereof that the welfare of the allottee might appear to him to require. *United States* v. *Thurston Co.*, 143 Fed. Rep. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. Rep. 87.

By leave of court, *Mr. Charles Quarles* and *Mr. Francis H. De Groat* filed a brief herein on behalf of the Red Cliff Lumber Company, as interested in the decision of this cause.

Mr. Justice McKenna delivered the opinion of the court.

This writ of error is directed to a judgment sustaining a demurrer to a complaint in an action to recover certain moneys

collected by the defendant who is an Indian agent, for timber cut from plaintiff's allotment. The case comes directly from the Circuit Court as involving the construction of a treaty.

The plaintiff is an infant Indian of the Chippewa Indians of the Lake Superior, and Tomkins is his duly appointed guardian.

A summary of the complaint is as follows:

On the first of October, 1901, the plaintiff then residing on the Bad River Indian Reservation, the President of the United States, in accordance with the provisions of the third article of the treaty, concluded September 30, 1854, with the Chippewa Indians of the Lake Superior, approved a selection of land made by plaintiff and assigned to him the west half of the southeast quarter of section four, township forty-six north, of range three west, of the fourth principal meridian in the State of Wisconsin.

Article three of the treaty is as follows (Indian Affairs Treaty, Volume of 1904, p. 648; 10 Stat. 1109):

"Article three. The United States will define the boundaries of the reserved tracts, whenever it may be necessary, by actual survey, and the President may, from time to time, at his discretion, cause the whole to be surveyed, and may assign to each head of a family, or a single person over twenty-one years of age, eighty acres of land for his or their separate use; and he may, at his discretion, as fast as the occupants become capable of transacting their own affairs, issue patents therefor to such occupants, with such restrictions on the power of alienation as he may see fit to impose. And he may, also at his discretion, make rules and regulations respecting the disposition of the lands in case of the death of the head of a family or single person occupying the same, or in case of its abandonment by them. And he may also assign other lands in exchange for mineral lands, if any such are found in the tracts herein set apart. And he may also make such changes in the boundaries of such reserved tracts or otherwise as shall be necessary to prevent interference with any vested rights. All necessary roads, highways and railroads, the lines of which may run through any

of the reserved tracts, shall have the right of way through the same, compensation being made therefor as in other cases."

By the act of Congress of February 11, 1901, c. 350, 31 Stat. 766, the right to allotments was extended to all Indians then residing on the La Pointe or Bad River Reservation, irrespective of age or condition. A patent was duly issued on the twenty-ninth of June, 1905, to plaintiff, and the land conveyed, exclusive of the merchantable timber standing thereon, is of the value of $1,000. On the eighth of January, 1902, the plaintiff made a contract with one Justus S. Stearns, by which he agreed to sell him the merchantable lumber under the rules and regulations approved by the President, December 8, 1893, standing or fallen, on said lands, and the said Stearns agreed to cut and remove the same, employing Indian labor therein, and pay to the United States Indian agent for the La Pointe agency, in trust for the plaintiff, certain designated sums, according to the kind of lumber cut. There were other details, which need not be mentioned. The agreement was subject to the approval of the Commissioner of Indian Affairs.

A copy of the regulations made in 1893 is attached to the contract, Rule 7 of which is the only one material, and is as follows:

"7. After deducting one-half of the cost of the scaling and other necessary expenses chargeable against the same, the proceeds of timber sold from the unallotted portions of the reservation shall be paid to the Indian agent, to be expended for the relief and benefit of the Indians of the reservation under the direction of the Commissioner of Indian Affairs, and the proceeds of timber taken from the allotted lands of the reservation shall, after the deductions above stated, be deposited in some national bank subject to check of the Indian owner of the allotment, countersigned by the Indian agent of the La Pointe agency, unless otherwise stipulated in contracts with particular Indians."

In December, 1902, the President amended that rule by adding thereto the following:

"If the Indian agent shall in any case be of the opinion that the allottee is not competent to manage his own affairs, he shall, subject to the approval of the Commissioner of Indian Affairs, have authority to fix the sum or sums, if any, such allottee shall be permitted to withdraw from deposit."

The Commissioner of Indian Affairs modified the agreement so as to make it subject to the amendment, and approved it as modified.

Between January, 1902, and the first of October, 1905, Stearns cut and removed under the contract timber of the value of at least $15,000, and paid that amount to the defendant for the use and benefit of the plaintiff, and that of that sum defendant has paid plaintiff only the sum of $3,100. Demand was made upon the defendant for the payment of the balance, but he refused, and still refuses, to pay the same, and announces that he will only pay plaintiff the sum of $10 per month, and claims the right to hold the same and pay the same out as he may be directed by the Commissioner of Indian Affairs.

Prior to the amendment of Rule 7 it had been for many years the established custom of the agents of the La Pointe Indian agency to pay the allottees under timber contracts the amount payable as fast as demanded by such allottees, such payments being left entirely to the Indian agents, the Commissioner of Indian Affairs in no manner interfering or attempting to control such payments, and that the defendant was the first to adopt the rule and practice of limiting payments to $10 per month, as he in his discretion thought best, giving as a reason therefor instructions from the Commissioner of Indian Affairs.

Plaintiff alleges that it does not fall within the scope of the authority of the Commissioner to interfere with the disposition of the money by the Indian agent, and that the guardian of the plaintiff is the proper party to determine how much shall be paid to and expended for plaintiff.

Damages are alleged at $11,900, and judgment is prayed for that amount.

The argument of this case has taken a somewhat wide range,

and counsel in other litigations for the Red Cliff Lumber Company have, by permission of this court, submitted a brief in support of the judgment of the Circuit Court. We think, however, the case is in narrow compass and depends for its decision upon the power reserved to the President by article three of the treaty, the patent and the terms of the contract with Stearns. It must at the outset be kept in mind that a policy of control over the Indians has always been observed by the Government. The many exercises of the policy which have been sustained by this court we need not stop to comment on. This policy is exercised in article three in the power reserved to the President to put in the patent "such restrictions upon the power of alienation as he may see fit to impose." In the exercise of this power the patent to plaintiff contains the condition that he shall not "sell, lease or in any manner alienate" the tract conveyed "without the consent of the President of the United States." There is a careful repetition of the conditions in the *habendum* that "all the rights, privileges, immunities and appurtenances" conveyed should be limited by the condition.

On December 6, 1893, the President made rules and regulations to govern contracts for the sale of timber by the Indians to whom allotments had been made and patents issued, prescribing certain conditions and prices, and requiring such contracts to be approved by the Commissioner of Indian Affairs, which approval, it was provided, should "operate as specific consent of the Executive to the sale of the timber to which the contract relates." Rule 7, which we have already given, was part of these rules and regulations. In December, 1902, however, the President made an order amending Rule 7, giving the Indian agent, subject to the approval of the Commissioner of Indian Affairs, authority to fix the sum or sums, if any, an allottee should be permitted to withdraw from deposit. Subject to this addition to Rule 7 the contract with Stearns was made and the timber cut. We cannot yield to the contention that the consent of the President to the contract ended his authority over the matter. In other words, that he could put

no conditions upon it. *United States* v. *Thurston County*, 143 Fed. Rep. 287; *National Bank of Commerce* v. *Anderson*, 147 Fed. Rep. 87.

The restriction upon alienation, however, it is contended, does not extend to the timber, and *United States* v. *Paine Lumber Co.*, 206 U. S. 467, is adduced as conclusive of this. We do not think so. There, as said by the Solicitor General, the land granted was arable, and could be of no use until the timber was cut; here the land granted is all timber land. And that the distinction is important to observe is illustrated by the allegations of the complaint. It is alleged that the value of the land, exclusive of the timber, is no more than $1,000; fifteen thousand dollars' worth of lumber has been cut from the land. The restraint upon alienation would be reduced to small consequence if it be confined to one-sixteenth of the value of the land and fifteenth-sixteenths left to the unrestrained or unqualified disposition of the Indian. Such is not the legal effect of the patent.

Judgment affirmed.